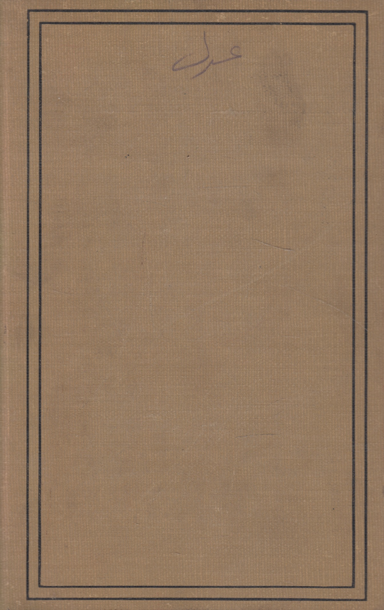








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

FEBRUARY 1, 1945, TO MAY 7, 1945 (PARTIAL)

WITH

REPORT OF

DECISIONS OF THE SUPREME COURT

IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

VOLUME CIII

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1946

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. - Price $2.25 (Buckram)



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[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserve, on active duty.
[2] On leave as of September 22, 1943, with War Food Administration.
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LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE LAW 23—79TH CONGRESS]

[CHAPTER 50—1ST SESSION]

[S. 167]

AN ACT

For the relief of Perkins Gins, formerly Perkins Oil Company, of Memphis, Tennessee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the statutes of limitation, so far as they bar the cotton linter claim of Perkins Gins, a corporation of Memphis, Tennessee, formerly the claim of Perkins Oil Company, also a corporation of Memphis, Tennessee, arising out of purchase contract numbered 3418, entered into by the said Perkins Oil Company, of Memphis, Tennessee, predecessor of said Perkins Gins, of Memphis, Tennessee, on September 16, 1918, with the United States of America be, and the same are hereby, waived and revoked.

SEC. 2. That the said claimant is hereby authorized to file within one year after the date of the enactment of this Act its said claim and have the same adjudicated by the Court of Claims of the United States.

Approved March 31, 1945.

[PUBLIC LAW 74—79TH CONGRESS]

[CHAPTER 173—1ST SESSION]

[H. R. 1804]

AN ACT

To amend the Act of Congress entitled "An Act for the relief of the Tlingit and Haida Indians of Alaska", approved June 5, 1942.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act for the relief of the Tlingit and

Haida Indians of Alaska", approved June 5, 1942 (56 Stat. 323), is amended to read as follows:

"That the time within which suit or suits may be filed by the Tlingit and Haida Indians of Alaska under the terms of the Act of Congress of June 19, 1935 (ch. 275, 49 Stat. L. 388), is hereby extended for a period of six years from and after the date of the approval of this Act."

Approved June 4, 1945.

CASES DECIDED

IN

THE COURT OF CLAIMS

February 1, 1945, to May 7, 1945 (partial), and other cases not heretofore published

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THE CHICKASAW NATION OF INDIANS v. THE UNITED STATES

[No. K-544. Decided January 8, 1945. Plaintiff's motion for new trial overruled April 2, 1945]*

On the Proofs

Indian claims; suit brought under special jurisdictional acts, as amended, for claims arising out of Indian treaties and agreements or Acts of Congress relating to Indian affairs.—Where the first claim in the instant suit arises under a presumed treaty or agreement of July 15, 1794, which cannot be located either in the original or in the form of a copy, but the existence of which is evidenced by references thereto in various appropriation acts acknowledging the obligation of the Government in accordance therewith to pay to the plaintiff an annuity of $3,000 in goods; it may not be said that Congress violated the unknown terms of the treaty or agreement by making no appropriations for such annuity prior to the appropriation for 1798 (1 Stat. 563, 564); and hence, the claim of $10,500 for the last half of the year 1794, and for the years 1795, 1796, and 1797 is without support and is not allowed.

Same; treaty of July 15, 1794, recognized by Congress in absence of proof of its ratification.—The treaty or agreement of July 15, 1794, was recognized by the Congress only insofar as appropriations were made, and it is to be given limited effect accordingly; recognition by the Court is proper notwithstanding lack of proof as to ratification. See *Moore* v. *United States*, 32 C. Cls. 593.

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* Reversed and remanded by the Supreme Court, November 5, 1945; 326 U. S. ——. See order of January 7, 1946, 105 C. Cls. ——.

Same; goods in payment of annuity obligations; receipt presumed where proof of shipment is shown.—Where it is shown that for the years 1798, 1799, and 1800 goods of the annuity values were forwarded for the Chickasaw Nation, it must be presumed that they were received in due course; the burden is upon the plaintiff to prove its case.

Same; burden of proof not shifted to defendant.—While the jurisdictional act waives the "lapse of time," it does not thereby shift the burden of proof to the defendant nor excuse the absence of proof by the plaintiff.

Same.—It must also be presumed that the goods forwarded were paid for out of the appropriations made in fulfillment of the supposed treaty or agreement.

Same; no proof that treaty obligation as to education was not fulfilled.—The fourth claim for a shortage of $3,859.42 in disbursement for the education of children of the tribe, pursuant to the treaty of May 24, 1834, is not allowed since it is not shown that the treaty obligation was unfulfilled.

Same; Act of July 5, 1862; suspending annuity payments to disloyal tribes; diversion of annuity funds to relief of loyal members of tribes who were destitute.—The evident purpose of the Act of July 5, 1862 (12 Stat. 512, 515), was to suspend, at the discretion of the President, the payment of annual treaty obligations to tribes that were then hostile to the United States and to make this money available for relief for individual members of these tribes who had been driven from their homes and reduced to want because of their loyalty to the Government and who might be scattered and could not be segregated by tribes for the purpose of general and immediate relief and individual, tribal accounting.

Same; suspense of annuities distinguished from accumulation.—To suspend or postpone annuities is very different from accumulating them; and to resume annuities at the end of a period of suspension does not include the payment of back annuities, which are *annual* allowances.

Same; relief funds not available only for refugees of particular tribe.—The Act of July 5, 1862, and succeeding acts suspending annuities to hostile tribes, did not require that annuity appropriations which would ordinarily have been paid to a particular tribe should be available only for relief for refugees of that tribe.

Same; recovery of balance, even if due, not possible where such balance is not ascertainable.—In *Seminole Nation* v. *United States*, 93 C. Cls. 500, 516, while doubt was expressed whether expenditure of tribal funds under the Act of July 5, 1862, was authorized for refugees of tribes other than those belonging to the tribe whose funds they were, it was held in the *Seminole* case that a distribution was authorized by the 1862 Act,

but recovery, if any, could be had only of the balance, and that balance, if any, is unknown, and there can be no recovery on this claim. (No. 5.)

Same; apportionment of salaries of mining trustees for Choctaw and Chickasaw Nations under the Atoka agreement.—Under the "Atoka Agreement" (30 Stat. 495, 505, 510) which provided for two trustees for the mining properties of the Choctaw and Chickasaw Nations, one trustee a Choctaw and one a Chickasaw, whose salaries were to "be fixed and paid by their respective nations," which arrangement continued until the enactment of the appropriation act of June 5, 1924 (43 Stat. 390), when one mining trustee was provided for the two nations, the apportionment of one-fourth of the expense to the Chickasaws and three-fourths to the Choctaws, as claimed by the plaintiff, would be to impose upon the Choctaws one-half the salary of the Chickasaw trustee provided the salaries were the same, which they were not, and on the basis of the salaries paid, for the 25-year period, the Choctaw Nation would pay to the Chickasaw trustee more than was paid to him by his own nation, contrary to the provisions of the Atoka agreement.

Same.—During the period in which there was only one trustee, the proper apportionment of expense is conceded to be one-fourth to the Chickasaws and three-fourths to the Choctaws, and on this basis the plaintiff is entitled to recover $312.23. See *Choctaw Nation* v. *United States and Chickasaw Nation*, 83 C. Cls. 140.

Same; distinction between funds expended "for" and "during" the scholastic year.—Where under the Act of April 26, 1906, the Secretary of the Interior was prohibited from expending from Chickasaw funds for school systems more in any one year than "the amount expended *for* the scholastic year ending June 30th, 1905"; a distinction is drawn between the language of the statute "for" the scholastic year and the plaintiff's claim based on the amount spent for schools "during" the year 1905; since it is apparent from the findings that tribal warrants issued for school purposes were not at once presented for payment, but if so presented were not paid until 1906. (No. 7.)

Same; agency expenses do not constitute a gratuity.—Miscellaneous agency expenses, including pay of employees for 1913, 1914, and 1917, aggregating $671.64, disbursed from Chickasaw tribal funds, were not expended for the benefit of plaintiff and hence do not constitute a gratuity, and plaintiff is entitled to recover.

Same; unauthorized expenditures for tribe's benefit not recoverable.—Following the decision in *Choctaw* v. *United States*, 91 C. Cls. 320, 371, expenditures of tribal funds, even where

made without specific appropriation by Congress in violation of Section 18 of the Act of August 12, 1912 (37 Stat. 518, 531), which on their face were for the benefit of the plaintiff, are not recoverable.

Same; appropriation for defalcation of Indian Agent disbursing officer.—Where Congress made an appropriation (10 Stat. 41, 43) to cover the defalcation of a disbursing agent; and where the amount appropriated was less than the amount of the book entry as to the defalcation; in the absence of proof of the amount of the defalcation, it cannot be said that Congress appropriated less than the actual loss, and plaintiff is not entitled to recover.

Same.—The interest allowed on the amount appropriated to cover the defalcation was not a gratuity, since interest was justly due, and plaintiff is not entitled to recover.

Same; accounting adjustments.—There can be no recovery for items represented by accounting adjustments where proof is insufficient and to readjust the accounting at this time might conceivably reintroduce errors which the adjustments were designed to correct.

Same; expense of transmitting tribal funds.—Where payment by defendant's fiscal officers of the expense of transmitting the collections of tribal funds to the United States Treasury was authorized by neither statute nor treaty but where transmittal of the funds was an incident of their collection and was for the benefit of plaintiff, there can be no recovery under the provisions of the Act of August 12, 1935 (49 Stat. 571, 596).

Same; unused gratuities offset against amount which plaintiff is entitled to recover.—The gratuities, amounting to $69,920.39, found in *Chickasaw Nation* v. *The United States and Choctaw Nation* (No. K–334), *post* page 45, but not used in that case are available for offset in the instant case and are so applied to the extent of $22,858.78, the amount which the plaintiff is entitled to recover, and the balance is available for future application; plaintiff's petition in the instant case being dismissed.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff. *Mr. Melven Cornish* was on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell* for the defendant.

The court made special findings of fact as follows:

1. This suit is brought under the special jurisdictional act of Congress approved June 7, 1924, 43 Stat. 537, Sections 1, 2, and 3 of which read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act. The claim or claims of each of said Indian nations shall be presented separately or jointly by petition in the Court of Claims, and such action shall make the petitioner party plaintiff or plaintiffs and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and said contract with such Indian tribe shall be executed in behalf of the tribe by the governor or principal chief thereof, or, if there be no governor or principal chief, by a committee chosen by the tribe under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided, however*, That the attorney or attorneys employed as herein provided may be assisted by the regular tribal attorney or attorneys employed under existing law under direction of the Secretary of the Interior, with such additional reasonable and necessary expenses for said tribal attorneys to be approved and paid from the funds of the respective tribes under the direction of the Secretary of the Interior, as may be required for the proper conduct of such litigation. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of the above-named Indian nations to such treaties, papers, correspondence, or records as may be

needed by the attorney or attorneys of said Indian nations.

SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nations, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

The special jurisdictional act was modified by Joint Resolution May 19, 1926, 44 Stat. 568, permitting plaintiff to bring separate suits on one or more causes of action, and by Joint Resolution approved February 19, 1929, 45 Stat. 1229, extending to June 30, 1930, the time for filing such suit or suits, and by the act of Congress approved August 16, 1937, 50 Stat. 650, authorizing the filing of amended petitions prior to January 1, 1938, to conform to the evidence.

2. A petition under the provisions of the act of June 7, 1924, was filed December 23, 1929, and in answer thereto the defendant February 1, 1930, filed a general traverse.

With leave of Court first obtained, plaintiff, on December 12, 1934, filed an amended petition, and with leave of Court first obtained, plaintiff, on September 23, 1936, filed a second amended petition, to which, on November 2, 1936, the defendant filed a general traverse.

By the act of Congress approved August 16, 1937, 50 Stat. 650, it is provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts (Cherokee Nation, Act approved March 19, 1924, 43 Stat. 27; Seminole Nation, Act approved May 20, 1924, 43 Stat. 133; Creek Nation, Act approved May 24, 1924, 43 Stat. 139; Choctaw and Chickasaw Nations, Act approved June 7, 1924, 43 Stat. 537; as amended by joint resolutions approved May 19, 1926, 44 Stat. 568; and February 19, 1929, 45 Stat. 1229), plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evi-

dence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits.

Under the provisions of the act of August 16, 1937, the plaintiff filed a third amended petition December 22, 1937, to which, on February 16, 1938, the defendant filed a general traverse.

3. By the act of June 12, 1798, 1 Stat. 563, 564, Congress appropriated: "For the payment of annuities to the Six Nations, Chickasaws, Cherokees, and Creeks, the sum of fourteen thousand dollars." This appropriation was for the calendar year 1798.

By an act of Congress approved February 25, 1799, 1 Stat. 618, entitled "An Act making appropriations for defraying the expenses which may arise, in carrying into effect certain Treaties between the United States and several tribes or nations of Indians," money was appropriated out of the revenues of the United States to satisfy what was termed in the act "An agreement made and entered into with the chiefs of the Chickasaw nation, in Philadelphia, on the fifteenth July, one thousand seven hundred and ninety-four, to pay to the said nation goods to the amount of three thousand dollars annually." In addition to the agreement mentioned the act made appropriations to cover treaties, named as such, with the Creeks, the Cherokees, and the Six Nations.

The agreement of July 15, 1794, with the Chickasaws, mentioned in the act, cannot be located either in the original

or in the form of a copy, and its terms are unknown except as they are evidenced by appropriation acts of Congress.

4. (a) *Unpaid annuities, $10,500.00.*

The plaintiff claims that the defendant failed to fulfill its obligations under the agreement of 1794 referred to in the act of 1799 for the last half of the year 1794 and for the years 1795, 1796, and 1797. For these three and one-half years the annuities, at the rate of $3,000 per year, would amount to $10,500.00.

(b) *Unpaid annuities, $42,000.00.*

The plaintiff further claims that the defendant failed to fulfill such obligations for the years 1798 to 1811, both inclusive, a period of 14 years and an aggregate of $42,000.00. Specific appropriations were made by Congress for the annuity of $3,000 beginning in 1798 and continuing down to 1901, beyond the period of claim made herein, the annuity being funded by the act of March 3, 1901, 31 Stat. 1058, 1062, in words as follows:

> For permanent annuity, in goods, three thousand dollars: *Provided*, That the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury, to the credit of the Chickasaws, the sum of sixty thousand dollars, being in full for the permanent annuity in money or otherwise, as guaranteed to them by the treaty of July fifteenth, seventeen hundred and ninety-four.

The so-called "agreement" of July 15, 1794, referred to as such in the act of 1799, is indifferently referred to in the appropriation acts as "agreement" or as "treaty."

Goods of the following values were forwarded from the War Department storehouse in Philadelphia for the Chickasaw Nation during the years listed:

Year forwarded	Value of goods	Annuity year	Year forwarded	Value of goods	Annuity year
1798	$3,000.00	1798	1808	$3,002.89	1808
1799	3,000.00	1799	1809	3,000.44	1809
1800	3,000.64	1800	1810	3,000.56	1810
1806	6,000.45	1805–1806	1811	3,000.03	1811
1807	3,000.16	1807			

The defendant's accounts are not in such shape or so complete as to show that the goods for these 10 years were paid for out of the money appropriated by Congress for the stipulated annuities of $3,000 per year, nor do the records show receipt of the goods by the Chickasaw Nation so forwarded from Philadelphia.

The records do not disclose forwarding of goods from the defendant to the Chickasaw Nation for the years 1801, 1802, 1803, or 1804, but they do disclose the purchase by the defendant during those years from moneys appropriated by Congress in fulfillment of various agreements or treaties with Indians northwest of the Ohio, the Six Nations, Chickasaws, Cherokees, and Creeks, of goods for distribution as annuities to those tribes in the following amounts for the years set out:

Year of Purchase:	*Value of goods*
1801	$31, 308. 90
1802	23, 406. 73
1803	25, 914. 23
1804	31, 810. 29

The record does not disclose how much of these purchases were for the account of the Chickasaw Nation.

(c) *Unpaid annuities, $4,446.05.*

From 1812 to 1852, both inclusive, a period of 41 calendar years, the total of annuities at $3,000 per year would be $123,000.00. This aggregate was appropriated by Congress in several amounts from time to time.

From the aggregate of $123,000.00 so appropriated there were expenditures for the benefit of the Chickasaw Nation for the same period $115,553.95, leaving unexpended $7,-446.05. Of the balance of $7,446.05 so unexpended, $3,000 was carried forward from year to year from that period and finally expended for refugee Indians, as set forth in Finding No. 8, *infra*. The final difference of $4,446.05 has not been disbursed for plaintiff's benefit.

5. *Unpaid annuities, $2,000.00.*

Article 3 of the treaty of September 20, 1816, 7 Stat. 150, between the United States and the Chickasaw Nation, provided that the United States pay the Chickasaw Nation "twelve thousand dollars per annum for ten successive years."

The total obligation of the United States under this treaty provision was $120,000. Appropriations were made by Congress to pay this amount. Disbursements to fulfill the obligation aggregated $118,000 only. The difference of $2,000 is due and owing the Chickasaw Nation under this treaty obligation.

6. *Unpaid annuities, $1,000.00.*

Article 3 of the treaty of October 19, 1818, 7 Stat. 192, 193, between the United States and the Chickasaw Nation, provided that the United States pay the Chickasaw Nation "the sum of twenty thousand dollars per annum, for fifteen consecutive years, to be paid annually."

The total obligation under this treaty provision was $300,000. Appropriations were made by Congress to pay this amount. Disbursements to fulfill the obligation were as follows:

Annuity, cash	$298, 951. 00
Iron and steel	49. 00
Total	299, 000. 00

The difference between the total obligation of $300,000 and the disbursement of $299,000 is $1,000, which is due and owing the Chickasaw Nation under this treaty obligation.

7. *Education of children, $3,859.42.*

Supplementary Article II of the treaty of May 24, 1834, 7 Stat. 450, 456, between the United States and the Chickasaw Nation, provided "that three thousand dollars for fifteen years, be appropriated and applied under the direction of the Secretary of War, for the education and instruction within the United States, of such children male and female or either, as the seven persons named in the treaty to which this is a supplement, and their successors, with the approval of the agent, from time to time may select and recommend."

Three thousand dollars per annum for 15 years is $45,000, and this amount was appropriated by Congress.

From the amount so appropriated there was disbursed by the defendant, for the purposes of the treaty stipulation $41,140.58 only, an underdisbursement of $3,859.42.

There is no evidence of record as to selection and recommendation of children for education.

8. *Refugees, $237,384.09.*

The Act of July 5, 1862, 12 Stat. 512, 515, entitled "An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the year ending June thirtieth, eighteen hundred and sixty-three," appropriated to the Chickasaws "For permanent annuity in goods, per act of twenty-fifth February, seventeen hundred and ninety-nine," $3,000.

The same act (id., 528) provided:

> That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: *Provided, further,* That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinabove appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government.

The act further provided:

> That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

A like appropriation was made by Act of Congress March 3, 1863, 12 Stat. 774, 777, with the provision (id., 793):

> That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount heretofore appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion, of whom shall be in a state of actual hostility

> to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as may be found necessary to enable such individual members of said tribes as have been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they can be removed to their homes, and to assist them in such removal.

A like appropriation was made by the Act of June 25, 1864, 13 Stat. 161, 165, with a similar provision as to relief of Indians adhering to the Government of the United States (id., 180) as provided in the Act of March 3, 1863.

A like appropriation was made by the Act of March 3, 1865, 13 Stat. 541, 544, also with a similar provision for relief (id., 562) as contained in the Act of March 3, 1863. The Act of March 3, 1865 (id., 563), further authorized and directed the Secretary of the Treasury

> to pay to the Secretary of the Interior two hundred and fifty thousand dollars for the relief and support of individual members of Cherokee, Creek, Choctaw, Chickasaw, Seminole, Wichita, and other affiliated tribes of Indians, who have been driven from their homes and reduced to want on account of their friendship to the government, as contemplated by the provisions of an act entitled "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with the various Indian tribes for the year ending June thirtieth, eighteen hundred and sixty-three," approved July fifth, eighteen hundred and sixty-two.

The accumulation of annuities under the treaty or agreement of July 15, 1794, for the five fiscal years 1862 to 1866, both inclusive, was $15,000.00. To this amount is added $3,000.00 that had been carried forward from year to year from the period 1812 to 1852, both inclusive, as explained in Finding No. 4, *supra*, a total accumulation of $18,000.00.

There has been appropriated by Congress and disbursed from funds in the defendant's hands standing to the credit of the plaintiff $237,384.09 for the benefit of refugee Indians, including Chickasaws.

The amount so appropriated and expended came into existence from the following sources:

Annuities appropriated under the treaty or agreement of July 15, 1794, for five fiscal years, 1862 to 1866, at $3,000 per year, $15,000, and $3,000 carried forward from year to year as explained in Finding No. 4 *supra*, total	$18,000.00
Sales of land and income from investments, accumulated under Treaty of May 24, 1834, 7 Stat. 450	219,384.09
	237,384.09

The disbursement thereof was allocated to refugee Indians as follows:

Fund	
$18,000.00—	
To Indians not designated	$17,137.71
To Indians other than Chickasaws	862.29
$219,384.09—	
To Chickasaws and other Indians	4,156.95
To Indians not designated	200,891.16
To Indians other than Chickasaws	14,335.98
	237,384.09

There is no record of the amount of disbursement that was for the benefit solely of Chickasaw refugees.

9. *Mining trustees, $312.23.*

The Act of June 28, 1898, 30 Stat. 495, 498, among other things, authorized and directed the Secretary of the Interior to make rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in Indian Territory and that all such leases should be made by the Secretary of the Interior. This act also ratified on the part of the United States (id., 505) the agreement of April 23, 1897, known as the "Atoka Agreement," and the agreement was subsequently approved by a majority vote of the members of each of the tribes.

Section 29 of the Atoka Agreement, as amended and published in 30 Statutes at Large, page 510, provided in part:

> It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw nations shall re-

> main and be the common property of the members of the Choctaw and Chickasaw tribes (freedmen excepted), so that each and every member shall have an equal and undivided interest in the whole; and no patent provided for in this agreement shall convey any title thereto. The revenues from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes. Such coal and asphalt mines as are now in operation, and all others which may hereafter be leased and operated, shall be under the supervision and control of two trustees, who shall be appointed by the President of the United States, one on the recommendation of the Principal Chief of the Choctaw Nation, who shall be a Choctaw by blood, whose term shall be for four years, and one on the recommendation of the Governor of the Chickasaw Nation, who shall be a Chickasaw by blood, whose term shall be for two years; after which the term of appointees shall be four years. Said trustees, or either of them, may, at any time, be removed by the President of the United States for good cause shown. They shall each give bond for the faithful performance of their duties, under such rules as may be prescribed by the Secretary of the Interior. Their salaries shall be fixed and paid by their respective nations, each of whom shall make full report of all his acts to the Secretary of the Interior quarterly. All such acts shall be subject to the approval of said Secretary.
>
> All coal and asphalt mines in the two nations, whether now developed or to be hereinafter developed, shall be operated, and the royalties therefrom paid into the Treasury of the United States, and shall be drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior.

Section 26 of the Act of June 28, 1898, reads: "That on and after the passage of this Act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory," and Section 28 abolished plaintiff's tribal courts effective October 1, 1898.

Section 29 of the Act incorporating the Atoka Agreement as amended, further publishes that agreement (in part) as follows, 30 Stat. 495, 512:

> It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the

> tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes.
>
> * * * * *
>
> It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.

The Act of April 26, 1906, 34 Stat. 137, entitled "An Act To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," provided, among other things (id., 141), that all taxes accruing under tribal laws or regulations of the Secretary of the Interior should be abolished from and after December 31, 1905. The Act also made provision for delivery and accounting to the Secretary of the Interior, upon dissolution of the tribal government, of tribal property; that lands belonging to the five civilized tribes, upon the dissolution of the tribes, should not become public lands nor property of the United States but should be held in trust by the United States for the use and benefit of the Indians respectively comprising each of the tribes; that the tribal existence and tribal governments should be continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but that in general the acts of the tribal council or legislature, to become valid, must be approved by the President of the United States, and this provision for approval applied also to tribal contracts.

The two mineral trustees referred to in the Atoka Agreement were paid on warrants issued by the tribal nations for the fiscal years 1900 to 1924, both inclusive, a period of 25 years, on the basis of salaries that had been designated, re-

spectively, by the Choctaw and Chickasaw Nations for their own trustee. From Choctaw funds the trustee for the Choctaw Nation was accordingly paid for that period $72,288.74; from Chickasaw funds the trustee for the Chickasaw Nation was accordingly paid for that period $80,461.42. The two trustees were paid separately.

The appropriation act of June 5, 1924, for the fiscal year ending June 30, 1925, 43 Stat. 390, 398, provided that "salaries and contingent expenses of * * * one mining trustee for the Choctaw and Chickasaw Nations at salaries at the rate heretofore paid" might be paid for the current fiscal year from tribal funds.

Subsequent appropriations were for one mineral trustee only for the two nations.

For the fiscal period 1925 to 1932, both inclusive, being eight years, the one mineral trustee was paid a total of $23,-693.94, of which $17,458.23 was paid from Choctaw funds and $6,235.71 from Chickasaw funds.

On an allocation of one-fourth from Chickasaw funds and three-fourths from Choctaw funds, the disbursement from Chickasaw funds for the period 1925–1932 would have been $5,923.48, an excess disbursement from Chickasaw funds of $312.23.

The defendant concedes the apportionment of one-fourth only of the charge to the Chickasaw funds, on the basis of *Choctaw Nation* v. *United States* and *Chickasaw Nation*, 83 C. Cls. 140, from the time of substitution of one trustee for two.

10. *Chickasaw schools, $1,107,035.57.*

Section 10 of the Act of April 26, 1906, 34 Stat. 137, 140, authorized and directed the Secretary of the Interior to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes March 5, 1906, and conduct their school systems until taken over by State or territorial governments, and for expenses of the schools to set aside and expend from respective Indian funds in the U. S. Treasury requisite amounts,

> not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending

June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five, "for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations," unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

For the fiscal year ending June 30, 1905, expenses of the Chickasaw schools were met by the issuance of tribal warrants, following the custom of previous years. These warrants could not be cashed until funds were available for their payment to the original payee or the holder and assignee. The records of the General Accounting Office show payment of Chickasaw warrants issued during the fiscal year ending June 30, 1905, for educational purposes, in the following manner:

During fiscal year ending June 30:	*Amounts*
1906	$150,697.94
1907	4,842.25
1908	12.00
Total	155,552.19

There is no proof of expenditure from Chickasaw funds in the United States Treasury in any one year, to the end of the fiscal year 1929, of any amount exceeding $155,552.19, for Chickasaw schools.

11. *Unappropriated disbursements, $4,494.87.*

The Act of Congress approved August 24, 1912, 37 Stat. 518, 531, provided in Section 18 thereof: "That during the

fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress" with exceptions enumerated. This provision, or a provision substantially the same, was carried in various succeeding annual appropriation acts for the respective years, until by the appropriation act for the fiscal year ending June 30, 1923, 42 Stat. 552, 575, it was provided: "That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress."

Disbursement made by the Secretary of the Interior from Chickasaw tribal funds during the fiscal years 1913 to 1929, both inclusive, not specifically appropriated for by the Congress and not within statutory exceptions, were as follows:

Item	Fiscal year	Amount	Total
Choctaw-Chickasaw Hospital	1917	$90.58	
Do	1923	.09	$90.67
Insurance	1916	595.35	
Do	1921	1,525.45	2,120.80
Medical attention	1920	13.50	
Do	1924	13.50	
Do	1925	282.45	
Do	1926	18.00	
Do	1928	594.15	
Do	1929	168.00	1,089.60
Miscellaneous agency expenses including employees	1913	480.34	
Do	1914	180.00	
Do	1917	11.30	671.64
Pay of grazing fee collector	1914	93.75	93.75
Pay of miscellaneous employees	1915	25.00	25.00
Pipeline damages	1916	12.00	
Do	1917	59.48	
Do	1919	140.91	
Do	1920	33.60	
Do	1927	8.02	254.01
Protection of lumber	1915	103.12	103.12
Roads and bridges	1913	25.50	25.50
Timber investigation	1917	20.78	20.78
			4,494.87

Miscellaneous agency expenses including employees for 1913, 1914, and 1917, aggregating $671.64, were not expended for the benefit of plaintiff. Recovery by the plaintiff of the other items listed in this account would constitute a gratuity under the act of August 12, 1935, 49 Stat. 571, 596.

12. (a) *Unexpended balances, $8,257.63.*

There have been advanced to defendant's disbursing officers for disbursement for the benefit of the plaintiff, moneys due the plaintiff under the treaty of May 24, 1834, 7 Stat. 450.

No settlements have been reported for certain balances of these moneys in the accounts of defendant's disbursing officers as follows:

J. J. Miller	$119.16
H. R. Pitchlyn	75.00
E. W. Andrews	112.50
E. W. Schon	5,250.00
C. Sangtree	243.93
T. H. Porter	1.20
D. Thompson	1,565.93
D. Vanderslice	889.91
Total	8,257.63

The accounts as reported by the defendant show no disbursement of the several amounts for the benefit of the plaintiff and there is due and owing the plaintiff the sum of $8,257.63.

(b) *Unpaid balance, $1,259.98.*

There is also an unaccounted for balance in favor of the plaintiff in the accounts of George Beck, superintendent of schools, Chickasaw Indians, of $1,259.98. In the state of accounts as they now stand this amount is due and owing the plaintiff.

(c) *Unpaid balance, $890.19.*

Plaintiff's claim for a balance of $890.19 in the accounts of F. H. Umholtz, school supervisor, Chickasaw Indians, is withdrawn.

13. *Defalcation, $6,585.92.*

The Act of August 30, 1852, 10 Stat. 41, 43, appropriated "For payment to the Chickasaw Indians for amount of defalcation of Captain R. D. C. Collins, United States disbursing agent, together with interest thereon at the rate of six percent per annum from March eighteen hundred and thirty-nine, until paid, twenty-four thousand nine hundred eighty-two dollars and twenty-nine cents."

This appropriation was to meet a credit in the fund "Carrying into effect Treaty with the Chickasaws," which bears the explanation "Shortage in the accounts of R. D. C. Collins—$31,568.21." The amount appropriated, $24,982.29, was restored to this fund. There was added to this principal $20,610.39 as interest on the principal at the rate of 6 percent per annum from March 1839, until paid.

Plaintiff claims the difference between the entry of $31,-568.21 and the principal appropriated $24,982.29, or $6,585.92.

There is no evidence of the amount of defalcation, other than the credit entry described and the appropriation made.

The amount of interest allowed the plaintiff, viz, $20,610.39, was not a gratuity.

14. There were from time to time transfers from Chickasaw accounts to accounts of other tribes.

(a) *Transfer, $1,150.00.*

Against the fund "Interest on Chickasaw National Fund," there appear as disbursements the following items "to adjust the following appropriations:"

Indian Moneys, Proceeds of Labor, Five Civilized Tribes, Okla	$294.92
Cherokee National Fund	100.00
Chickasaw 3% Fund	2.40
Administration of Affairs, Five Civilized Tribes	319.84
Industrial Work and Care of Timber, 1916	30.67
Interest on Cherokee Moneys on Deposit in Banks	168.20
Interest on Seminole Moneys on Deposit in Banks	191.74
Probate Attorneys, Five Civilized Tribes, Oklahoma, 1916	42.23
Total	1,150.00

These are adjusting entries made under the administration of the Bureau of Indian Affairs. There is no evidence that the adjustments were improper or of lack of authority in the administrative officials to make the entries.

The accounting in this case is insufficient to establish error in defendant's handling of the fund "Interest on Chickasaw National Fund."

(b) *Transfer, $685.83.*

In the account "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Royalties, Grazing, etc.," are indicated refunds to other tribes, which are as follows:

To: Indian Moneys, Proceeds of Labor (Creek)	$15.17
Indian Moneys, Proceeds of Labor, Choctaw Town Lots	14.61
Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc	656.05
Total	685.83

These three amounts were severally taken up in the respective accounts of the Creeks and Choctaws. They appear

as adjusting entries, and there is no proof of error in the transfers.

(c) *Transfer, $13.68.*

In the account "Indian Moneys, Proceeds of Labor, Chickasaw (Cattle Tax)," there is indicated:

Refunded to "Indian Moneys, Proceeds of Labor, Choctaw Town Lots"	$13.68

This amount was taken up in Choctaw accounts. It appears as an adjusting entry, and there is no proof of error in the refundment.

(d) *Transfer, $34.12.*

The account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Right-of-Way," shows as refunded to other funds a total which includes the following:

To—Indian Moneys, Proceeds of Labor, Choctaw Town Lots	$28.12
Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc	6.00
Total	34.12

These were adjusting entries, and there is no proof of error in the adjustment. They were duly taken up in Choctaw accounts.

(e) *Transfer, $381.73.*

The account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Town Lots," shows as refunded an amount which includes $381.73 to "Indian Moneys, Proceeds of Labor, Choctaw Town Lots." This amount was duly taken up in Choctaw accounts and was an adjusting entry. There is no proof of error in the adjustment so made.

(f) *Transfer, $2,595.07.*

The account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Unallotted Lands," shows as refunded to other funds an amount which includes $2,595.07 to "Indian Moneys, Proceeds of Labor, Choctaw Unallotted Lands."

This sum was duly taken up in Choctaw accounts, and represents an adjusting entry. There is no proof of error in the adjustment.

(g) *Transfer, $1,340.00.*

The account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Unallotted Lands," shows:

Transferred to—

"Indian Moneys, Proceeds of Labor, Choctaw Unallotted Lands" $40.00

"Interest on Choctaw Moneys on Deposit in Banks" 1,300.00

These two amounts were taken up in Choctaw accounts. There is no proof that the transfers so made were improper. They were adjusting entries.

(h) *Transfer, $2,088.68.*

The account of the fund "Interest on Chickasaw Moneys on Deposit in Banks" shows $2,088.68 "transferred to interest on Choctaw moneys on deposit in banks."

This item was duly taken up in the accounts of the Choctaw Nation. It represents an adjustment of accounts and there is no proof that the transfer was erroneously made.

(i) *Transfer, $90.85.*

The account of the fund "Interest on Chickasaw Moneys on Deposit in Banks" shows refunded to other funds an amount which includes $90.85 to "Interest on Creek Moneys on Deposit in Banks."

This sum was duly taken up in accounts of the Creek Nation. This was an adjustment in the accounts of the two nations, and no error appears in the transaction.

15. There were from time to time deposits made in the United States Treasury to the credit of funds other than those of the Chickasaw Nation, deposits representing a part of total collections in connection with the management of tribal properties jointly for the Chickasaw and Choctaw Nations.

(a) *Deposit of $15,211.95.*

This deposit was comprised of two items, $15,176.95 and $35.00, and was made in the United States Treasury to the credit of the Choctaw Nation. The accounts also indicate the items as "Chickasaw School Receipts."

They are part of total collections of $34,628,451.50 in connection with the management of tribal properties for both the Chickasaw and Choctaw Nations.

There is no indication in the accounting made or exhibited in this case that the administrative action in depositing these items to the credit of the Choctaw Nation was incorrect.

(b) *Deposit of $1,477.02.*

There is indicated in defendant's accounts as deposited in the United States Treasury to the credit of "Indian Moneys, Proceeds of Labor, Cherokee Unallotted Lands," $5,908.10. The accounts also indicate that this money was derived from the sale of Chickasaw and Choctaw unallotted lands. The plaintiff herein claims one-fourth thereof.

There is no proof that the administrative deposit thus made was incorrect or improper.

(c) *Deposit of $63.63.*

The accounts show as deposited in the United States Treasury to the credit of the Creek Nation, "Indian Moneys, Proceeds of Labor," a sum which includes $61.62 indicated as derived from "Sale of subsistence, Chickasaw school," and $2.01, indicated as derived from "Sale of Cotton, Chickasaw school," a total of $63.63.

There is no proof that the administrative deposit thus made was incorrect or improper.

(d) *Deposit of $567.79.*

The accounts show as deposited in the United States Treasury to the credit of the Creek Nation, "Indian Moneys, Proceeds of Labor," a sum which includes (1) $649.40 indicated as derived from sale of Chickasaw and Choctaw unallotted lands, one-fourth of which, $162.35, the plaintiff claims herein, and (2) $1,621.75 indicated as derived from sale of Chickasaw and Choctaw town lots, one-fourth of which, $405.44, the plaintiff claims herein, making a total claim of $567.79.

There is no proof that the administrative accounting, by deposit as indicated, was incorrect or improper.

(e) *Deposit of $3.84.*

The accounts show as deposited in the United States Treasury to the credit of the Creek Nation, "Proceeds of Land, etc., Five Civilized Tribes (Creek)," a sum which includes $3.84, indicated as derived from the sale of Chickasaw surface segregated lands.

There is no proof that the administrative deposit of this sum to the credit of the Creek Nation, as described, was incorrect or improper.

16. *Interest on bank deposits, $5,156.00.*

There were certain items indicated as interest on deposits of Chickasaw funds in Oklahoma banks that were carried in the accounts as deposited in the United States Treasury to the following funds, in the amounts indicated:

Interest on Cherokee Moneys on Deposit in Banks	$200.00
Interest on Choctaw Moneys on Deposit in Banks	4,845.33
Interest on Creek Moneys on Deposit in Banks	110.67
	5,156.00

This is interest on collections made jointly for the Choctaw and Chickasaw Nations. They appear to be adjustments made administratively, and there is no proof of impropriety or incorrectness in the deposits as made in the United States Treasury.

17. *Disbursements for exchange fees, $2,749.43.*

There were disbursements aggregating $2,749.43 made from Chickasaw funds for exchange fees. They represent the expense of transmitting collections for the Choctaws and Chickasaws to the Treasury of the United States, and were deducted by the fiscal officers from the collections made. The gross collections are reported at $34,628,451.50, of which amount $157,801.23 represents collections for the Chickasaws, and $34,470,650.27 both for Choctaws and Chickasaws. If the ratio of one to three be used for apportioning the exchange fees to Chickasaws and Choctaws, the respective amounts would be $687.36 and $2,062.07.

Payment by defendant's fiscal officers of the expense of transmitting the collections to the United States Treasury, out of the amounts collected, was authorized neither by statute nor treaty. Recovery of plaintiff's proportion, $687.36, in a judgment herein, would constitute a gratuity under the Act of August 12, 1935, 49 Stat. 571, 596.

18. (a) *Disbursements for other tribes, $20,436.65.*

In the account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Royalties, Grazing, etc." there appears:

Disbursements for the benefit of the Choctaw Nation of Indians	$20,436.65

The purpose of this disbursement is explained in the report of the General Accounting Office as follows:

Disbursed for the benefit of the Choctaw Nation of Indians for the following purposes:

Choctaw Nation:		
Education:		
Clothing	$8.75	
Traveling expenses of school employees	2.90	$11.65
Mississippi Choctaws:		
Per capita payments		20,425.00
		20,436.65

This disbursement appears to be a part of an extensive redistribution of funds among the Choctaws, Chickasaws, and Mississippi Choctaws, made on a per capita or other basis. There is no proof of error in the redistribution.

(b) *Disbursements for other tribes, $41,262.05.*

In the account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Town Lots," appears the following entry:

Disbursements for the benefit of the Choctaw Nation of Indians	$41,262.05

The report of the General Accounting Office explains this item as follows:

This amount was disbursed for the Choctaw Nation of Indians for the following purposes:

Choctaw Nation per capita payments	$27,175.07
Mississippi Choctaws per capita payments	14,011.59
Per capita payment expenses	75.39
	41,262.05

This disbursement appears to be a part of an extensive redistribution of funds among the Choctaws, Chickasaws, and Mississippi Choctaws, made on a per capita or other basis, and there is no proof of error in the redistribution.

(c) *Disbursements for other tribes, $1.97.*

In the account of the fund "Proceeds of Land, etc., Five Civilized Tribes (Chickasaw)," there is the following entry:

Disbursements for the benefit of the Choctaw Nation of Indians	$1.97

The report of the General Accounting Office explains this entry as follows:

Disbursed for the Choctaws for:
  Education:
    Transportation of supplies __________ $1.97

This disbursement appears to be a part of an extensive redistribution of funds among the Choctaws, Chickasaws, and Mississippi Choctaws, made on a per capita or other basis, and there is no proof of error in the redistribution.

19. (a) *Failure to include $480.73 in Chickasaw Funds.*

The statement of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Indians, Indian Territory," as reported by the General Accounting Office, shows the following credit entry:

Adjustment to fund __________ $480.73

The General Accounting Office report explains this item as follows:

> Represents an amount refunded by J. M. Simpson, Supervisor of Schools, on repay covering warrant No. 775, dated June 20, 1901, which amount was posted to this fund but not included in the ledger total. See settlement No. 34996, fourth quarter 1901; also see Indian Office ledger 54, Folio 70.

The ledger account of the Indian Office cited above properly shows the item of $480.73 recorded as a debit to the fund account maintained in that office, but the fund was not increased by this entry because this item was not included in the total of the fund for the year, and the balance was carried forward incorrectly.

In the summary statement of this fund reported by the General Accounting Office this item was included in the total fund to be accounted for. Accordingly this statement should show a balance in the fund of $480.73. But this fund had been closed by the Indian Office since 1903, without taking into account the $480.73.

The report of the General Accounting Office was merely reconciled with the ledger account of this fund as kept by the Indian Office, by showing a credit entry in its report, "Adjustment to fund $480.73."

Credits against funds purport to show disbursements or other disposition of moneys in the funds. The proposed entry

by the General Accounting Office would dispose of the item which the Indian Office failed to include in the fund when it was received.

There is no evidence to indicate that this amount has been since restored to any of plaintiff's funds.

(b) *Failure to credit Chickasaw funds, $3,700.00.*

The account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Unallotted Lands," shows the following entry:

> Advanced to the Bank of Tuttle, Tuttle, Oklahoma $3,700.00."

The General Accounting Office report gives the following explanation:

> This amount represents an advance to the Bank of Tuttle, Tuttle, Oklahoma (see Settlement No. 17808–1920), which amount was transferred to D. Buddrus, Disbursing Agent, Union Agency, and taken up by him as Creek funds and disbursed as such. See page 635, Item (e), of the General Accounting Office Report, In re: Creek Petition No. H–510.

There are no adjustments which can be identified as restoring this amount to any of the Chickasaw funds.

(c) *Failure to credit Chickasaw funds $609.00.*

In the account of the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Unallotted Lands," appears the entry:

Adjustment of moneys on deposit in banks---------- $609.00

The General Accounting Office in its report furnishes the following explanation:

> Bank deposits to the credit of the Chickasaw Nation of Indians, transferred to D. Buddrus, Disbursing Agent, Union Agency, and taken up by him as Choctaw moneys, as follows:

Bank Settlement No.	Officers' Settlement No.	Amount	
15823	16742	$1,000.00	
17404	17770	3,750.00	
17145	17770	2,734.00	
17344	17770	9,000.00	$16,484.00

Bank deposits to the credit of the Choctaw Nation of Indians, transferred to the aforesaid Buddrus and taken up by him as Chickasaw moneys as follows:

Bank Settlement No.	Officers' Settlement No.	Amount	
21912	16742	$2,500.00	
36625	17770	3,375.00	
35851	17770	10,000.00	$15,875.00

Net loss of funds to Chickasaw Nation, $609.00.

The net amount of $609.00 was erroneously taken up in the fund "Indian Moneys, Proceeds of Labor, Choctaw Unallotted Lands," and disbursed as such. There were no adjustments indicating that the difference of $609.00 was restored to any of the Chickasaw funds.

20. (a) *Chickasaw moneys returned to surplus, $100.00.*

The account of the fund "Interest on Chickasaw Incompetent Fund," contains the entry:

Surplus Warrant No. 732, dated June 30, 1877 .... $100.00

This sum was erroneously transferred to surplus.

(b) *Chickasaw moneys returned to surplus, $264.09.*

The account of the appropriation "Fulfilling Treaties with Choctaws and Chickasaws" bears the following entry:

Surplus Warrant No. 531, dated August 31, 1872 .... $1,056.36

One-fourth of this, the Chickasaw share, is $264.09.

The Acts of July 26, 1866, 14 Stat. 255, 259, and of April 10, 1869, 16 Stat. 13, 39, together appropriated out of the Treasury of the United States a total of $5,858.47, for pay of commissioners to be appointed by the President, as per Articles 49 and 50 of the Treaty of April 28, 1866. Only $4,802.11 of this was expended, and the remainder of $1,056.36 was properly returned to surplus August 31, 1872, as indicated.

(c) *Chickasaw moneys returned to surplus, $21.52.*

In the account of "Judgment, Court of Claims, Choctaw and Chickasaw Nations," appears the following entry:

Surplus Warrant No. 62, dated March 19, 1929 .... $86.08

One-fourth of this amount is $21.52, which was erroneously returned to surplus.

DEFENDANT'S CLAIM OF OFFSETS

21. (a) *Transfer, $1,125.00.*

There was disbursed from the fund "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," the sum of $1,125.00 as "transferred to 'Interest on Chickasaw National Fund.'"

This was taken up in the fund to which it was thus shown as transferred. The transfer represents an adjustment in the administration of the affairs of the Five Civilized Tribes, and no error is shown in the adjustment made.

(b) *Transfer, $684.68.*

In the account "Indian Moneys, Proceeds of Labor, Choctaw Indians, Indian Territory," there is a credit entry of $684.68 as "refund to other Indian funds." This item was taken up in the fund "Indian Moneys, Proceeds of Labor, Chickasaw Indians, Indian Territory."

It represents an adjustment in book entries, and there is no proof of error in the adjustment made.

(c) *Transfer, $870.56.*

In the account for the fund "Indian Moneys, Proceeds of Labor, Choctaw Indians, Indian Territory," is an item of disbursement as follows:

Transferred to "Indian Moneys, Proceeds of Labor, Chickasaw Indians, Indian Territory" $870.56

This item was taken up in the fund "Indian Moneys, Proceeds of Labor, Chickasaw Indians, Indian Territory," and the transfer represents an adjustment in accounting. There is no proof of error in the adjustment made.

(d) *Transfer, $1,001.90.*

The fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Royalties, Grazing, etc.," has the following entry:

Deposited to the credit of the Chickasaw Nation of Indians from the following sources:
Miscellaneous receipts for other tribes $1,001.90

The sources of these receipts are indicated in the report of the General Accounting Office as follows:

Choctaws:		
Board of school employees	$478.94	
Music tuition collected	40.67	
Interest on Choctaw moneys on deposits	145.60	
		$665.21
Creek:		
Sale of land for right-of-way	31.30	
Telephone line damages	18.66	
Pipe line damages	14.46	
		64.42
Cherokee:		
Sale of colored school	37.50	
Sale of land for right-of-way	.13	
Telephone line damages	8.39	
		46.02
Seminole:		
Rental from Emahaka Mission school land		226.25
		1,001.90

These items appear to be adjustments in the accounts of the Five Civilized Tribes, and there is no evidence that the adjustments so made were erroneous.

(e) *Transfer, $199.10.*

This item is shown in the accounts as transferred by bookkeeping entry from the fund "Indian Moneys, Proceeds of Labor, Choctaw, Royalties, Grazing, etc.," to the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Royalties, Grazing, etc."

It appears to be an administrative adjustment in handling the funds of the tribes concerned, and there is no proof of error in the adjustment.

(f) *Transfer, $16,190.00.*

This item is a transfer from the fund "Indian Moneys, Proceeds of Labor, Choctaw Town Lots," to the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation Town Lots."

There is no proof that the transfer was erroneous.

(g) *Transfer, $79.14.*

This item is a deposit in the fund "Indian Moneys, Proceeds of Labor. Chickasaw Nation, Unallotted Lands," and

the accounts indicate that it was derived from the following sources:

Creek:

Sale of unallotted lands	$17.38		
Sale of town lots	25.96		
Sale of improvements	8.75		
		$52.09	
Seminole:			
Sale of unallotted lands		27.05	
			$79.14

There is no proof that the amount involved was not properly due the Chickasaw Nation.

(h) *Transfers, $1,076.32.*

This item appears as a receipt in the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Unallotted Lands," from other Chickasaw funds.

(i) *Transfer, $3,801.09.*

This item appears as a receipt in the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Unallotted Lands," from other Chickasaw funds.

(j) *Transfer, $9.17.*

This item represents the restoration of $9.17 to the Chickasaw fund "Interest on Chickasaw Moneys on Deposit in Banks," transferred from the Choctaw fund "Indian Moneys, Proceeds of Labor, Choctaw Unallotted Lands." It is a part of other administrative adjustments, made in the course of accounting and correction of errors, and there is no proof that the adjustments were incorrect.

(k) *Transfer, $2.53.*

This is an item of interest first stated in the accounts as on Choctaw moneys on deposit in Oklahoma banks under the act of March 3, 1911 (36 Stat. 1058, 1070). It was not deposited in the Treasury of the United States, but was withdrawn and credited direct to the Chickasaw Nation under "Interest on Chickasaw Money on Deposit in Banks," and taken up in that fund.

This transaction appears as an adjustment or division of collections under the administration of the affairs of the Five Civilized Tribes, and there is no proof that the transfer made was erroneous.

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(l) *Transfer, $7,030.84.*

In the account "Indian Moneys, Proceeds of Labor, Choctaw Town Lots," appears the disbursement:

"Disbursements made for the benefit of the Chickasaw Nation of Indians, $7,030.84." The explanation of this given in the General Accounting Office report is "per capita payments to Chickasaws."

This appears to be one of many adjustments of funds for per capita payments made among the Choctaws, Chickasaws, and Mississippi Choctaws, and there is no evidence of irregularity or impropriety in the adjustment made.

(m) *Transfer, $259.89.*

This is an item of interest first stated in the accounts as on Choctaw moneys on deposit in Oklahoma banks under the act of March 3, 1911 (36 Stat. 1058, 1070).

This item was entered in the accounts as "deposited in the United States Treasury to the credit of other nations or tribes of Indians under 'Interest on Chickasaw Moneys on Deposit in Banks,' $259.89," and was taken up in that fund.

This transaction appears as an adjustment or division of collections under the administration of the affairs of the Five Civilized Tribes, and there is no proof that the transfer made was erroneous.

(n) *Transfer, $145.60.*

This sum is included in the item of $1,001.90, set forth in this finding in paragraph (d).

(o) *Transfer, $31.30.*

The accounts show an entry transferring the sum of $31.30 to "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Royalties, Grazing, etc.," from a Choctaw fund entitled "Indian Moneys, Proceeds of Labor, Wheelock Female Orphan Academy."

This item purports to represent an adjustment in the administration of the funds of the Five Civilized Tribes, and no error in the adjustment has been proved.

(p) *Transfer, $4,574.87.*

This item is one-fourth of a larger item of $18,299.51 which was deposited to the credit of the Choctaw and Chickasaw Nations from collections entered in the accounts of the Creeks.

The source of the collection of $18,299.51 is explained as

follows, and as apportioned, one-fourth to the Chickasaw Nation:

		One-fourth
Right-of-way tax	$128.20	$31.30
Telephone line damages	71.63	18.66
Pipe-line damages	57.85	14.46
Sale of town lots and unallotted lands and interest on purchase-money balance	18,041.83	4,510.45
	18,299.51	4,574.87

The fractional amounts of $31.30 and $18.66 are computed on $125.20 and $74.63, and not on $128.20 and $71.63, respectively, but the totals are not affected by the shift of $3.00. The several amounts of $31.30, $18.66, and $14.46 are the identical amounts shown in section (d) of this finding. The three items of $31.30, $18.66, and $14.46 were taken up in the fund "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Royalties, Grazing, etc.," as indicated in section (d) of this finding.

Of the sum of $18,041.83, there was taken up in "Indian Moneys, Proceeds of Labor, Chickasaw Nation, Town Lots," the sum of $4,458.39 only, which is $52.06 less than one-fourth, $4,510.45. The difference of $52.06 is represented by the sum of $52.09 taken up in Chickasaw funds as related in Finding No. 21 (g), above.

The transactions in connection with this item appear to be administrative adjustments of accounts in the Five Civilized Tribes, and there is no proof that they were incorrectly made.

Offsets

22. In the case of *Chickasaw Nation* v. *The United States* and *the Choctaw Nation*, Docket No. K–334, in this Court, it is found that numerous sums were expended gratuitously by the United States for the benefit of the Chickasaw Nation of Indians. [*Post*, p. 45] The gratuities so expended are listed in detail and total $69,920.39. The facts respecting these gratuities, found in that case, are hereby made a part of these findings by reference.*

The Court decided that the plaintiff was entitled to recover the sum of $22,858.78, and that the defendant was entitled

* Amended by order of January 7, 1946, setting forth offsets in detail.

to offset against this amount a like sum of $22,858.78 for gratuities expended for plaintiff's benefit, and plaintiff's petition was dismissed.*

WHALEY, *Chief Justice*, delivered the opinion of the court:

The several Acts of Congress under which this suit is brought and jurisdiction given to entertain it are set forth in Finding No. 1. Amended petitions have been filed and issue joined by general traverse.

The claims sued on here are solely those of the Chickasaw Nation. The Jurisdictional Act, 43 Stat. 537, June 7, 1924, covers "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

The act waives the lapse of time and statutes of limitation.

The claims will be discussed in the order in which they appear in the special findings of fact.

With the exception of a short deposition the parties rely entirely on defendant's accounting, the results of which have been filed in the case, and the parties are bound thereby. The reports so filed constitute for all practical purposes the sole source of information.

The first claim is stated in the petition at $114,487.96, which plaintiff now reduces to $63,222.19. It arises under a presumed treaty or agreement of July 15, 1794. This treaty or agreement is not in evidence and neither the original nor copy thereof can be located. Its existence is evidenced only by a reference thereto in various appropriation acts and in them it appears sometimes as an "agreement," other times as a "treaty." By these various appropriations it appears that the obligation the Government assumed was the payment to the plaintiff of an annuity of $3,000 in goods.

* See order of January 7, 1946.

Appropriations of $3,000 per year were made by Congress until by the Act of March 3, 1901, 31 Stat. 1058, 1062, this annuity was funded at $60,000.

Without knowledge of the terms of the treaty or agreement, it may not be said that Congress violated them by making no appropriations sooner than it did. Hence, the claim of $10,500 for the last half of the year 1794 and for the years 1795, 1796, and 1797 is without support and cannot be allowed.

After Congress did begin appropriating to fulfill the treaty or agreement, the appropriations were without lapse.

The treaty or agreement was recognized by the Congress only insofar as appropriations were made, and it is to be given limited effect accordingly. Recognition by the Court is proper notwithstanding lack of proof as to ratification. See *Moore* v. *United States et al.*, 32 C. Cls. 593.

For the years 1798, 1799, and 1800 goods of the annuity values were forwarded from the War Department storehouse in Philadelphia for the Chickasaw Nation. It must be presumed that they were received in due course. To require the defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. The burden is upon the plaintiff to prove its case. While the jurisdictional act waives the "lapse of time," it does not thereby shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff.

It must also be presumed that the goods forwarded were paid for out of the appropriations made in fulfillment of the supposed treaty or agreement. The Government's accounts are not complete in that respect, but it may not be assumed that the Government paid for the goods without appropriation. Counsel do not invite attention to any other appropriations.

For the years 1801, 1802, 1803, and 1804 the records disclose purchase by the defendant of annuity goods for various tribes, including the plaintiff, but do not show how much was allocated to the plaintiff. Unless this allocation is known, the

shortage, if any, in the goods annuity of $3,000 cannot be ascertained. The accounts show no shortage for which judgment may be given.

For the period 1805 to 1811, inclusive, the same remarks are applicable as for the period 1798 to 1800, inclusive, and there can be no recovery.

By the treaty of October 19, 1818, 7 Stat. 192, 194, pending goods annuities were to be paid in cash.

For the period 1812 to 1852 inclusive, the accounts show a balance unexpended from appropriations amounting to $4,446.05 which plaintiff is entitled to recover. As shown by Finding No. 4, an additional item of $3,000 was unexpended for that period, but it was carried forward in the accounts until finally expended for refugee Indians, as explained in Finding No. 8. Having been finally expended, the validity of the expenditure—that is, for the benefit of refugee Indians—will be discussed under the question of expenditures for refugee Indians.

The second claim is for an unexpended balance of $2,000 under a treaty obligation of September 20, 1816, the obligation having been duly appropriated for. Recovery is due in the sum of $2,000.

The third claim is for $1,000. Finding No. 6 shows it to be an unexpended balance of a treaty obligation of October 19, 1818, duly appropriated for. Recovery is due in the sum of $1,000.

The fourth claim is for a shortage of $3,859.42 in disbursement for the education of children of the tribe, pursuant to the treaty of May 24, 1834 (Finding No. 7). The treaty obligation of $45,000 was duly appropriated by Congress, but the children to be educated were to be selected and recommended by a designated set of seven persons. More children could not be educated than were selected and recommended, and since, as the findings state, there is no evidence as to selection and recommendation, it does not appear that the treaty obligation was unfulfilled. It was not a bare cash annuity without a defined application. The object was apparently attained, the expense of educating selected and recommended children duly met, and there can be no recovery.

The fifth claim (Finding No. 8) is the "refugee" claim. The Act of July 5, 1862, appropriated $3,000 "For permanent annuity in goods, per act of twenty-fifth February, seventeen hundred and ninety-nine." But in this Act was a general proviso (it is quoted at length in the findings) for the suspension of appropriations for those Indians in hostility against the United States, including the Chickasaws and other named tribes, "at and during the discretion and pleasure of the President," and the Act further provided that the President might expend appropriations *already made and unexpended*, to relieve individual members of the tribes driven from their homes and reduced to want because of their friendship to the Government. There were similar succeeding acts of Congress, the Secretary of the Interior being substituted for the President.

The Act of July 5, 1862, further authorized the President to proclaim treaties with the hostile tribes abrogated, but no such proclamation appears to have been promulgated.

The Act of July 5, 1862, was perhaps peculiar in its language, in that it permitted that "appropriations * * * be suspended * * * at * * * the discretion * * * of the President." But what the Act did that is of particular concern here was to authorize the President to expend treaty appropriations for the benefit of individual refugees.

To suspend or postpone annuities is very different from accumulating them. To resume annuities at the end of a period of suspension does not include the payment of back annuities. Annuities are *annual* allowances. Moreover, the Act of July 5, 1862, and succeeding acts did not require that annuity appropriations for hostile Chickasaws should be available only for Chickasaw refugees, Choctaws for Choctaws, Cherokees for Cherokees. The appropriations were of Government monies, not of tribal funds, and the self-evident purpose of the Act of July 5, 1862, was to suspend the payment of annual treaty obligations, the money thus set free to be available for refugees, who might in the very nature of the situation be scattered and impractical of segregation into tribes for the purpose of general and immediate relief, and individual accounting.

The Act of July 5, 1862, permitted expenditure for the benefit of refugee Indians of moneys *already appropriated* to satisfy treaty obligations, but not yet expended. The item of $3,000 referred to in Finding No. 4 as carried forward from year to year comes within this class of unexpended funds. This item, added to the annuities for the five fiscal years 1862 to 1866 under the treaty or agreement of July 15, 1794, which comes into the picture only by reference to it in acts of Congress, gives a sum of $18,000, as explained in Finding No. 8. There was available also a fund amounting to $219,-384.09 from sales of land and income from investments, accumulated under the treaty of May 24, 1834, a total of $237,384.09. And this total of $237,384.09 was distributed to refugee Indians. The accounts do show that Chickasaw refugees received some benefit from these disbursements, but how much the accounts do not disclose.

Doubt was expressed in *Seminole Nation* v. *United States*, 93 C. Cls. 500, 516, whether expenditure of funds under the Act of July 5, 1862, for refugees of tribes other than those belonging to the tribe whose funds they were, was authorized. How much in the instant case was expended for the benefit of Chickasaw refugees we do not know. Were it now held definitely that funds of one tribe should not have been expended for the benefit of refugees of another tribe, we would still be unable to ascertain the amount of judgment to be given. For the Chickasaw refugees have received some benefit from the distribution, and it was held in the *Seminole case* that a distribution was authorized by the Act of July 5, 1862. Recovery, if any, could be had only of the balance, and that balance is unknown.

There can be no recovery on this claim.

The sixth claim is for $42,586.11, said to have been disbursed from Chickasaw funds over and above one-fourth of the total expense of the salaries paid to mining trustees of coal deposits jointly owned by the Choctaw and Chickasaw nations. As will be seen by the legislation and agreements set forth in Finding No. 9, there were originally two trustees for the mining properties, one a Choctaw, the other a Chickasaw, their salaries to "be fixed and paid by their respective nations." This arrangement continued down to the appro-

priation act of June 5, 1924, 43 Stat. 390, when one mining trustee only was provided for, for the two nations. Plaintiff would have it that the apportionment of one-fourth of the expense to the Chickasaws and three-fourths to the Choctaws should have obtained while there were two trustees, a trustee of each nation. The effect of this would be to impose upon the Choctaws one-half the salary of the Chickasaw trustee, provided the trustees had the same salaries.

For the 25-year period involved in Finding No. 9, however, the salaries were not the same. The Choctaw trustee was paid $72,288.74, the Chickasaw trustee $80,461.42, a total of $152,-750.16. One-fourth of this total is $38,187.54. Under the apportionment claimed by the plaintiff—that is, one-fourth to the Chickasaws, three-fourths to the Choctaws—the Chickasaw trustee's salary of $80,461.42 would be paid $38,187.54 by the Chickasaws themselves and $42,273.88 by the Choctaws. In other words, for representing the Chickasaw interests the Chickasaw trustee would be paid the greater part of his salary by the Choctaws.

But the Atoka agreement, 30 Stat. 495, 505, 510, specifically provided that the trustees' salaries should "be fixed and paid by their respective nations."

Down to the appropriation Act of June 5, 1924, providing for one mining trustee only, there appears to have been sufficient tribal existence and tribal government to fix the trustees' salaries, and the court finds that as a matter of fact for the entire 25-fiscal-year period, 1900 to 1924, the mining trustees were paid on warrants issued by the tribal nations.

During the period in which there was one trustee only the proper apportionment of expense is conceded to be one-fourth to the Chickasaws, three-fourths to the Choctaws. On this basis the plaintiff is entitled to recover $312.23.

The seventh claim is covered by Finding No. 10. The Act of April 26, 1906, prevented the Secretary of the Interior from expending from Chickasaw funds for school systems more in any one year than "the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five."

Plaintiff says that "during" the scholastic year 1905 an amount of $20,871.88 only was disbursed for schools. But

the statute expresses the maximum differently. It says expended "for" (not "during") the scholastic year 1905.

Expenses for the Chickasaw schools were met by tribal warrants. It is apparent from the findings that tribal warrants issued for school purposes in 1905 were not at once presented for payment, but if so presented were not paid until 1906. The amount paid on these warrants, issued for educational purposes in 1905, amounted to $155,552.19.

There is no proof of expenditure from Chickasaw funds in the United States Treasury for any one year, to the end of the fiscal year 1929, of any amount exceeding $155,552.19. Consequently there can be no recovery.

The eighth claim is for expenditures from tribal funds made without specific appropriation by Congress, in violation of Section 18 of the Act of August 24, 1912, 37 Stat. 518, 531. Such unlawful expenditures were made, and they are listed item by item in Finding No. 11. As to items other than $671.64 for "Miscellaneous agency expenses including employees", they would be recoverable except that on their face they would be gratuities for the benefit of the plaintiff if expended from funds of the United States and not from tribal funds. To give plaintiff judgment for them would result in expenditure from funds of the United States of gratuities for the plaintiff's benefit.

Section 2 of the Act of August 12, 1935, 49 Stat. 571, 596, provides:

> In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Court of Claims in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: *Provided*, That expenditures made prior to the date of law, treaty, or Executive order under

which the claims arise shall not be offset against the claims or claim asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984), except expenditures under appropriations made pursuant to section 5 of such Act, shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Court of Claims or hereafter filed: *Provided further*, That funds appropriated and expended from tribal funds shall not be construed as gratuities; and this section shall not be deemed to amend or affect the various Acts granting jurisdiction to the Court of Claims to hear and determine the claims listed on page 678 of the hearings before the subcommittee of the House Committee on Appropriations on the second deficiency appropriation bill for the fiscal year 1935: *And provided further*, That no expenditure under any emergency appropriation or allotment made subsequently to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public works and public projects for the relief of unemployment or to increase employment, and for work relief (including the civil works program) shall be considered in connection with the operation of this section.

It was held in effect in *Choctaw Nation* v. *United States*, 91 C. Cls. 320,371, that expenditures in the way of beneficial gratuities, derived through a judgment, were improper under the act of August 12, 1935. It follows that plaintiff is not entitled to judgment for the difference of $3,823.23 even though expended from tribal funds without appropriation by Congress. The item of $671.64 would not be a gratuity, and it is therefore recoverable.

The ninth claim is for certain balances of the plaintiff alleged to have been advanced to disbursing officers, but not expended or accounted for. Finding No. 12 describes them. On this claim plaintiff is entitled to recover $9,517.61, made up of $8,257.63 and $1,259.98.

The tenth claim is based on recorded defalcation of a disbursing agent. The accounts bear an entry of $31,568.21 stated as "Shortage in the accounts of R. D. C. Collins—$31,568.21." But when Congress came to appropriate money to cover the shortage only $24,982.29 was appropriated as principal, and that amount was restored to the fund.

In the absence of proof of the amount of the defalcation, aside from the entry of $31,568.21, it cannot be said that Congress appropriated less than the net actual loss. We have the judgment of Congress against an accounting entry, and no recovery can be had. Nor can it be said that the substantial interest allowed, $20,610.39, was a gratuity. Interest was justly due and defendant may not recover it as gratuity.

The eleventh claim covers several items that plaintiff describes as "Unauthorized transfers of Chickasaw funds to funds of other tribes." These items are set forth in Finding No. 14.

The finding states the absence of proof and this lack precludes recovery. The items were adjustments in the accounts. To readjust them requires more information than the accounting affords. Presumably there was reason for making the adjustments and at this time to readjust the accounting might conceivably reintroduce errors that the adjustments were designed to correct.

No recovery can be had on these items.

The twelfth claim the plaintiff entitles "Unauthorized deposit of Chickasaw moneys to funds of other tribes." The items are listed in Finding No. 15.

These claims have the defect of those in the preceding finding. There is lack of proof that the deposits were erroneously made. The mere fact of deposit to other than a Chickasaw fund, without more, does not entitle plaintiff to recover. It is quite evident that the accounting of funds was a major proposition. Under such circumstances numerous corrections, adjustments, transfers were necessary. It would be altogether exceptional if they were not necessary. No judgment of recovery can be based on the showing made.

The thirteenth claim is described in Finding No. 16. It is an item of $5,156.00 interest on bank deposits indicated in the accounts as accruing on Chickasaw funds, but transferred and redeposited in the United States Treasury in three several amounts as interest on Cherokee, Choctaw, and Creek bank deposits. They represent collections jointly for the Choctaw and Chickasaw Nations. The assignment to the Cherokees, Choctaws, and Creeks was an administrative ad-

justment, as to which there is no proof of impropriety or incorrectness. The claim may not be allowed.

The fourteenth claim is for alleged illegal disbursements from Chickasaw funds for exchange fees. There is no question that Congress did not authorize the disbursement; the defendant concedes that; but to recover the fees now would constitute a gratuity under the Act of August 12, 1935, 49 Stat. 571, 596. Transmittal of the funds to the U. S. Treasury was an incident of their collection, which was being done for the plaintiff's benefit by the Government's fiscal officers. There can be no recovery, therefore, on this item.

The fifteenth claim is, as the plaintiff states it, "illegal disbursements of Chickasaw funds made by defendant for other tribes." The facts relative thereto are set forth in Finding No. 18.

In the voluminous accounting of Indian funds there were necessarily many adjustments and redistributions. In none of the items described in this finding is there proof of error in redistribution, and we may not assume that such an error existed, where the action taken appears as an adjustment, or readjustment. The plaintiff is not entitled to recover on this claim.

The sixteenth claim, as plaintiff styles it, is "Errors of defendant in failing to credit Chickasaw funds with Chickasaw moneys." The plaintiff is entitled to recover on this claim, in its entirety, consisting of three items, (a) $480.73, (b) $3,700.00, (c) $609.00, a total of $4,789.73. The first item, $480.73, is a manifest error in bookkeeping. The two other items are errors by the disbursing agent at the Union Agency, in the taking up of Chickasaw funds, and are allowable items.

The seventeenth claim is entitled "Chickasaw moneys erroneously returned to surplus by defendant." Two items of this claim, (a) $100.00 and (c) $21.52, were transferred or returned to surplus in error and are recoverable in the total amount of $121.52. The second item (b) was properly returned to surplus and may not be recovered. It was part of an appropriation to pay commissioners for service rendered, and the plaintiff here is not entitled to receive their pay, if in fact they were underpaid.

The eighteenth and last claim of the plaintiff is for interest on enumerated items, being for the major part items for allegedly excess annual expenditures of Indian funds on schools. See Finding No. 10, which is plaintiff's seventh claim, described above, no part of which is allowed. The principal not being recoverable, the claim for interest also falls.

Interest is also claimed on the two items of $93.75 and $25.00, which will be found in Finding No. 11 herein. The items of principal not being recoverable, interest also is not recoverable.

The remainder of the case is confined to defendant's claim of offsets. This claim is covered by Finding No. 21 and consists of several items. None of them is an allowable item. They are all transfers, without any proven error. In fact two of them are merely transfers from one Chickasaw fund to another.

As has already been indicated, no readjustment is proper where the adjustment is not shown to be erroneous. To make another adjustment might well result in nullifying the correction of an error.

The special findings made are far more elaborate than requested by either side. A thorough investigation has been made in matters of accounting, with results that are, in many instances, contrary to the requests made. The findings requested by either party have not been in satisfactory detail.

Plaintiff is entitled to recover on items and in amounts as follows:

Finding:	*Amount*
4 (c)	$4,446.05
5	2,000.00
6	1,000.00
9	312.23
11	671.64
12 (a)	8,257.63
12 (b)	1,259.98
19 (a)	480.73
19 (b)	3,700.00
19 (c)	609.00
20 (a)	100.00
20 (c)	21.52
Total	22,858.78

There remains the matter of gratuities, if any, under the Act of August 12, 1935, to be offset against the sum of $22,858.78 recoverable by the plaintiff.

The gratuities found in *Chickasaw Nation* v. *The United States and Choctaw Nation*, case No. K-334, decided this day, *post*, page 45, amount to $69,820.39, but are not used in that case and are therefore available in their entirety for offset in the instant case. They are so applied to the extent of $22,-858.78, and the balance is available for future application.

The petition must be and is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE CHICKASAW NATION v. THE UNITED STATES AND THE CHOCTAW NATION

[No. K-334. Decided January 8, 1945. Plaintiff's motion for new trial overruled April 2, 1945]*

On the Proofs

Indian claims; suit for value of lands taken by Government by erroneous survey.—Proceedings under Rule 39 (a) to determine amount of recovery and amount of offsets, if any, under the findings and opinion of May 5, 1941, 94 C. Cls. 215.

Same; previous findings and opinion confirmed.—The findings and opinion of the court May 5, 1941 (94 C. Cls. 215), holding that the 136,204.02 acres in question had been taken by the Government on March 3, 1875, and that the value thereof as of that date was $68,102.00 are confirmed, upon reargument under rule 39 (a).

Same; amount due plaintiff as just compensation.—Under the former opinion (94 C. Cls. 215, 238) holding that the payment to plaintiff of $17,025.50 (one-fourth of the sum of $68,102.00) with interest thereon at the rate of 5 per centum per annum from February 19, 1906, to date of judgment, would constitute just compensation to plaintiff for its share in the lands taken, it is now *held* that the plaintiff is entitled to recover the sum of $50,128.27, representing principal and interest.

* Plaintiff's petition and defendant's petition for writ of certiorari denied October 15, 1945.

Same; defendant's counterclaim allowed.—On the defendant's counterclaim it is *held* that under section 3 of the jurisdictional act (43 Stat. 537), as amended, the defendant is entitled to an offset of $57,500.00 representing the amounts advanced to the Chickasaw Nation against plaintiff's portion of the $300,000.00 which the Government agreed, in the treaty of April 28, 1866, with the Choctaw and Chickasaw Nations, to pay for the cession of certain land, provided the Choctaws and Chickasaws adopted the Freedmen, or former slaves, of these Nations and granted them the rights of citizenship; these conditions not having been complied with by the Chickasaw Nation.

Same; right to require repayment of advances not waived by Government.—By the provisions of the "Atoka Agreement" of 1898 (30 Stat. 495) the Government did not waive, relinquish nor surrender any right which it may have had to have the advances of $57,500.00 repaid, nor is it shown that repayment was waived by the Government by any other treaty or agreement subsequent to the treaty of 1866.

Same; judgment on Government's cross-action against Choctaw Nation.—Where the Choctaw Nation, under the judgment in *Choctaw Nation v. United States*, 21 C. Cls. 59, was paid the entire amount of $68,102.00 for the lands in question; and where no portion thereof was paid to the Chickasaw Nation (94 C. Cls. 215, 222, finding 15); and where the United States is paying the amount of plaintiff's one-fourth interest in the said sum of $68,102.00, or $17,025.50, by an offset of a legal claim against plaintiff; it is *held* that the Government is entitled to recover $16,003.97 from the Choctaw Nation on the Government's cross-action against the Choctaw Nation. (94 C. Cls. 215, 239.)

The Reporter's statement of the case:

Mr. Melven Cornish for the plaintiff.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

This case was originally tried, argued, and submitted on two questions: First, the date of taking by the Government of 136,204.02 acres by reason of an erroneous survey which was specifically ratified and adopted by an act of Congress of March 3, 1875, as the permanent boundary line between the state of Arkansas and the Indian Territory; and, second, the value of such lands at the date of taking.

These questions were considered and decided by the court in findings and opinion of May 5, 1941, 94 C. Cls. 215, and the amount of recovery and the amount of offsets, if any, were reserved for further proceedings under rule 39 (a).

The Court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The 136,204.02 acres of land in question were taken by the defendant, as found by the court, 94 C. Cls. 215, on March 3, 1875.

2. The value of the lands at the time of taking on March 3, 1875, was $68,102.

DEFENDANT'S COUNTERCLAIM

3. Article III of the Treaty of April 28, 1866 (14 Stat. 769), between the United States and the Choctaw and Chickasaw Nations provides as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three

> fourths to the former and one fourth to the latter,—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

4. The Chickasaw Nation did not, pursuant to the foregoing article or otherwise, within two years from the date of ratification of that treaty or at any time give to persons of African descent resident in that nation at the date of that treaty and their descendants, or either thereof, theretofore held in slavery among the Chickasaw Nation, the rights, privileges, and immunities, including the right of suffrage, of citizens of the Chickasaw Nation, or any of such rights, or give to such persons of African descent forty acres each of land, or any land, of the Chickasaw Nation on the same terms as the Choctaws and the Chickasaws, or otherwise, or at all.

5. Article XLVI of the same treaty provides:

> Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws,

and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five percent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively.

6. The United States advanced to the Chickasaw Nation pursuant to the terms of Article XLVI set out above the aggregate sum of $57,500 which was made up of the following items:

(a) An amount of $50,000 which is referred to in the above article. It was appropriated by the Act of July 26, 1866 (14 Stat. 259), and it was paid to the treasurer of the Chickasaw Nation during the fiscal year 1867.

(b) The remaining amount, $7,500, represents two payments of $3,750 as interest accumulated on the principal sum on the assumption that the Chickasaw Nation would adopt the Freedmen. The first payment was appropriated by the Act of July 26, 1866 (14 Stat. 259), and it was paid to the treasurer of the Chickasaw Nation during the fiscal year 1868. The second payment was appropriated by the Act of April 10, 1869 (16 Stat. 39), and it was paid to the treasurer of the Chickasaw Nation during the fiscal year 1869. No other portion of the $300,000 was ever paid or credited to the Chickasaw Nation.

Neither the total amount of $57,500 nor any part thereof has been repaid to the United States.

7. One provision of an agreement entered into involving the Choctaw and Chickasaw Nations and commonly referred to as the "Atoka Agreement," ratified as Section 29 of the

Act of Congress of June 28, 1898 (30 Stat. 495, 513), reads as follows:

> It is further agreed that all of the funds invested, in lieu of investment, treaty funds, or otherwise, now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be capitalized within one year after the tribal governments shall cease, so far as the same may legally be done, and be appropriated and paid, by some officer of the United States appointed for the purpose, to the Choctaws and Chickasaws (freedmen excepted) per capita, to aid and assist them in improving their homes and lands.

OFFSETS FOR GRATUITOUS EXPENDITURES AND DISBURSEMENTS

8. During the period from the beginning of the fiscal year 1877 to the end of the fiscal year 1934 the United States expended from public funds gratuitously, and without obligation under any treaty or agreement, and for the benefit of the Chickasaw Nation, the sum of $1,489.35 for the following purposes:

Purpose	Appropriations from which paid	Gratuity Rept., G. A. O. (pages)	Amount
Agricultural aid	Agriculture and stock raising among Indians.	8	$182.09
Automobiles and repairs.	do	8	148.34
Household equipment	Support of Indians and administration of Indian property.	63	80.85
Indian dwellings	do	62	73.77
Medical attention	Conservation of health among Indians. Relieving distress and prevention, etc., of disease among Indians.	11.60	194.49
Presents	Support of Indians and administration of Indian property.	63	30.00
Provisions	do	62.63	779.81
			$1,489.35

9. During the period from the beginning of the fiscal year 1877 to the end of the fiscal year 1896 the United States expended from public funds gratuitously, and without obligation under any treaty or agreement, and for the bene-

fit of the Choctaw and Chickasaw Nations, the sum of $10,358.53 for the following purposes:

Purpose	Appropriations from which paid	Gratuity Rept., G. A. O. (pages)	Amount
Education	Civilization fund Support of schools not otherwise provided for.	194, 243	$10,358.53

10. During the period from the beginning of the fiscal year 1877 to the end of the fiscal year 1934 the United States disbursed from public funds gratuitously, and without obligation under any treaty or agreement, and for the benefit of the Chickasaw Nation the sum of $28,898.47 for the following purposes incident to "Education":

Purpose	Appropriations from which paid	Gratuity Rept., G. A. O. (pages)	Amount
Board and tuition	Indian Schools, Five Civilized Tribes Indian Schools, Five Civilized Tribes	48–50	$3,148.75
Books, stationery, etc.	do	39, 40, 46–50	901.18
Clothing	Indian Schools, Five Civilized Tribes	40, 47, 48	3,199.05
Erection and repairs of school buildings.	Indian Schools, Five Civilized Tribes	50	3,802.81
Fuel, light and water for Indian buildings.	do	50	112.90
Furniture and equipment.	do	39, 40, 48	2,120.60
Hardware, glass, oil and paints for schools.	do	40, 48	195.31
Hospital equipment at schools.	do	40, 48	91.64
Medical attention	do	50	1.35
Pay of miscellaneous school employees.	do	49, 50	14.67
Pay of school superintendents and teachers	Indian Schools, Five Civilized Tribes Support of schools not otherwise provided for.	39, 40, 47, 48, 64	3,402.34
Provisions	Indian Schools, Five Civilized Tribes	50, 51	17.50
School farm	do	48, 50	153.78
Traveling expenses	Indian Schools, Five Civilized Tribes	41, 46, 48	43.76
Transportation, etc., of supplies, other than treaty supplies.	Purchase and transportation of Indian supplies. Telegraphing, transportation, etc., Indian supplies.	58, 65	11,693.73
			28,898.47

11. During the period from the beginning of the fiscal year 1897 to the end of the fiscal year 1934 the United States

expended from public funds gratuitously, and without obligation under any treaty or agreement, and for the benefit of the Choctaw and Chickasaw Nations the sum of $25,790.50 for the following purposes:

Purpose	Appropriations from which paid	Gratuity Rept., G. A. O. (pages)	Amount
Clothing	Conservation of health among Indians	207	$129.83
Education	Purchase and transportation of Indian supplies.	230	501.74
Fuel, light and water for Indian buildings.	Conservation of health among Indians	208	151.63
Hardware, glass, oils and paints for Indian buildings.	do	207	9.49
Expenses of locating coal and asphalt land.	Commission, Five Civilized Tribes	202	1,662.89
Per capita payment, expenses.	Administration of affairs of Five Civilized Tribes.	185	208.71
Expenses of protecting property interests.	Protecting property interest of minor allottees, Five Civilized Tribes.	227	356.50
Provisions and other rations.	Conservation of health among Indians	207	54.75
Expense of timber estimating.	Administration of affairs of Five Civilized Tribes.	185, 201, 204	7,035.45
Transportation, etc., of supplies.	Conservation of health among Indians. Purchase and transportation of Indian supplies.	207-8, 230	15,679.51
			25,790.50

12. During the period from 1877 to the end of the fiscal year 1934 the members of the Chickasaw Nation composed approximately 21.06 percent of the total population of the Choctaw and Chickasaw Nations. Upon that basis the defendant expended gratuitously for the benefit of the Chickasaw Nation, and without obligation under any treaty or agreement, 21.06 percent of the sum of $36,149.02 shown to have been expended by the defendant in findings 9 and 11, such amount being $7,612.98. The expenditures shown in findings 10 and 11 were made for the Choctaw and the Chickasaw Nations jointly, and it cannot be shown, except by allocation on the basis of population, what portion of the expenditures was made for the benefit of each tribe.

13. During the period from the fiscal year 1897 to the end of the fiscal year 1934 the United States expended from public funds gratuitously for the benefit of the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations or Tribes of Indians, and without obligation under any treaty or agree-

ment, the sum of $429,026.75, which was charged to these tribes jointly for the following purposes:

Purpose	Appropriations from which paid	Gratuity Rept., G. A. O. (pages)	Amount
Agricultural Aid	Agriculture and stock raising among Indians.	279, 412–4	$24, 331. 81
	Support of Indians and Administration of Indian property.		
Construction and maintenance, Claremore Hospital.	Conservation of health among Indians	305, 335, 343, 397.	77, 127. 98
Pay and expenses of farmers.	Agriculture and stock raising among Indians.	279–80, 332–4, 365.	327, 566. 96
			429, 026. 75

14. During the period from 1877 to the end of the fiscal year 1934 the Chickasaw tribe of Indians composed 7.44% of the total population of the Cherokee, Choctaw, Chickasaw, Seminole, and Creek tribes of Indians. Defendant expended for the benefit of plaintiff gratuitously and without obligation 7.44% of the sum of $429,026.75, said amount being $31,919.59.

15. The expenditures shown in finding 13 were made for the benefit of all the Five Civilized Tribes jointly, and it cannot be shown, except by allocation on the basis of population, what portion of the expenditures was made for the benefit of each tribe.

16. The gratuitous expenditures for the benefit of the Chickasaw Tribe, for the purposes and in the amounts above set forth in findings 8 to 14, inclusive, were included in the total gratuitous expenditures of $1,326,651.37 found to be allowable as a proper offset by this court in the case of *The Choctaw and Chickasaw Nations* v. *United States*, Congressional No. 17641, 88 C. Cls. 271, but no part of the claim made in that case and referred to this court for findings under sec. 151, Judicial Code, has been allowed by Congress and no part of the gratuitous expenditures found and set forth in the present case has been used in any other case as offsets against any amount found to be legally due plaintiff tribe.

17. The total of the gratuitous expenditures, among others, made by defendant for plaintiff's benefit, as listed in the findings herein, is $69,920.39.

Upon the foregoing findings of fact and the findings of fact by the court of May 5, 1941 (94 C. Cls. 215, 238), which were made a part of the judgment herein, the Court decided that plaintiff was entitled to recover just compensation of $17,025.50, and interest of $33,102.77, at five percent per annum from February 19, 1906, to date of judgment, a total of $50,128.27.

The court further decided that the defendant, the United States, was entitled to recover on its counterclaim of $57,-500.00 against the plaintiff; and of that amount $50,128.27 was allowed as an offset against the amount found to be due the plaintiff.

The court further decided that the United States was entitled to recover $16,003.97 over against the Choctaw Nation on its cross-action.

The petition of the plaintiff was accordingly dismissed, and judgment in favor of the United States and against the Choctaw Nation was entered for $16,003.97.

LITTLETON, *Judge*, delivered the opinion of the court:

This case is now before the court on defendant's counterclaim in the amount of $57,500 and its claim for offsets under the act of August 12, 1935, 49 Stat. 571, for certain amounts expended gratuitously for the benefit of the Chickasaw Nation, and on plaintiff's reargument of the question of value on March 3, 1875 of the 136,204.02 acres of land owned jointly by the Chickasaw and Choctaw nations and taken by the defendant on that date.

The case was originally tried, argued, and submitted on the questions of the date of taking of the land and the value thereof at the date of taking.

In the findings and opinion of the court May 5, 1941, 94 C. Cls. 215, we determined that the land had been taken by the Government on March 3, 1875, and that the value of the 136,204.02 acres on that date was $68,102. We have considered plaintiff's reargument as to the value of the land

on the hearing under rule 39 (a) and adhere to the value of $68,102 for the land on March 3, 1875, as previously determined.

Upon the record we are of opinion that defendant's counterclaim for $57,500 as an offset under sec. 3 of the jurisdictional act (43 Stat. 537) is allowable. As shown in findings 3 to 6, incl., the Government advanced to and paid plaintiff a total of $57,500 in three payments, the first in the amount of $50,000 during the fiscal year 1867 and the second and third in the amount of $7,500 each in the fiscal years 1868 and 1869, respectively, under arts. 3 and 46 of the treaty of April 28, 1866, with the Choctaw Nation and the Chickasaw and Choctaw nations, as set forth in findings 3 and 5. These sums were advanced and paid to plaintiff against plaintiff's portion of the $300,000 which the Government agreed to pay to the Choctaws and Chickasaws for the cession of certain land, provided the Choctaws and Chickasaws adopted the Freedmen (former slaves) and granted to such persons of African descent "all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; * * *." In anticipation that the Choctaws and Chickasaws would give to all persons of African descent resident in said nations the rights and allotments mentioned, art. 46 of the treaty provided that of the moneys stipulated to be paid to the Choctaws and Chickasaws under the treaty on the conditions specified the sum of $150,000 would be advanced and paid to the Choctaws and $50,000 to the Chickasaws as soon as practicable after ratification of the treaty, to be repaid out of said moneys, or any other moneys of said nations in the hands of the United States. The Choctaw Nation adopted their Freedmen and granted to them the rights mentioned in the treaty and that nation received its portion of the $300,000

mentioned, but the Chickasaw Nation refused to grant its Freedmen, or persons of African descent, the rights mentioned in art. 3 of the treaty and, thereby, did not become entitled to receive any portion of the $300,000, and no portion thereof was ever paid or credited to the Chickasaw Nation other than the advances which were to be repaid, totaling $57,500.

Plaintiff makes the argument in answer to defendant's counterclaim that the United States waived, relinquished, and surrendered any right which it may have had to have the advances, totaling $57,500, repaid in that part of sec. 29 of the "Atoka Agreement" of 1898 (30 Stat. 495) quoted in finding 7. We think this contention cannot be sustained. No mention was made in any treaty or agreement subsequent to the treaty of 1866 that the Government's right to insist upon repayment of the advances mentioned was satisfied and discharged, and we do not find any provision in the Atoka Agreement which necessarily implies such an arrangement. The fact that in the Atoka Agreement the Government did not, at that time, insist that the sums advanced be then repaid does not prove, in the absence of evidence sufficient to show the clear intention of the parties, that the Government was relinquishing and surrendering its legal right to insist upon repayment by offsets or a charge against tribal funds at a later date. Defendant's counterclaim is therefore allowable and the sum of $50,128.27 thereof is allowed as an offset against an equal sum heretofore and herein determined to be due plaintiff as just compensation for its interest in the 136,204.02 acres of land taken by defendant in 1875. This offset is authorized by sec. 3 of the jurisdictional act, which provides that "In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian Nations."

This decision on defendant's counterclaim makes it unnecessary to use as offsets against the amount due plaintiff the sums totaling $69,920.39 expended gratuitously for the benefit of plaintiff, as set forth in findings 8 to 14, incl.

Plaintiff is not entitled to recover and its petition is therefore dismissed.

The United States filed a cross-action for judgment over against the Choctaw Nation under section six of the jurisdictional act. As set forth in the findings and opinion of May 5, 1941 (94 C. Cls. 215), the Choctaw Nation, under the judgment of this court in *Choctaw Nation* v. *United States*, 21 C. Cls. 59, was paid the entire amount of $68,102 for the value of the land here in question, and no portion thereof was paid to the Chickasaw Nation (see finding 15, 94 C. Cls. 215). Inasmuch as the United States is paying the amount of plaintiff's one-fourth interest of $17,025.50 in the value of the land taken in 1875 by an offset of a legal claim against plaintiff, the Government is entitled, for the reasons set forth in our former opinion in this case, to recover $16,003.97 from the Choctaw Nation. Judgment will accordingly be entered. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CLARKE BROTHERS CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 45096. Decided January 8, 1945. Plaintiff's motion for new trial overruled April 2, 1945]

On the Proofs

Government contract; plaintiff not misled.—Where the plaintiff corporation made a contract with the Government to clear lands on certain forks of the Black Warrior River in Alabama, which lands were to be covered with water upon the completion of Dam 17, on the river; and where the invitation for bids included a copy of the proposed contract, a copy of the specifications, and a map, on which had been placed, before it was reproduced to be sent to prospective bidders, an area of shading showing the portion in which the water level was to be raised by the impounding of the waters; and where before submitting plaintiff's bid its president personally visited and inspected the site of the work, and later, after submitting its bid but before the contract was signed, plaintiff's president conferred with the contracting officer as to the character and extent of the

work to be done; it is *held* (1) that the plaintiff was not misled by the map and (2) that if it was misled, it was not reasonably misled, since the map, together with the accompanying papers, could not reasonably be interpreted as the plaintiff claims it interpreted them, and, hence, plaintiff is not entitled to recover.

Same; contracting officer's recommendation to his superior not a decision under Article 15 of the contract.—A communication from the contracting officer to his superior, the Chief of Engineers, which was not written in the form of a decision but of a recommendation, and which was not addressed to, or communicated to, the plaintiff, was not a decision of the contracting officer within the meaning of Article 15 of the contract.

The Reporter's statement of the case:

Mr. Challen B. Ellis for the plaintiff.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of Iowa, with its principal office at Clinton, Iowa.

2. Pursuant to an invitation to bid, a bid made, and the acceptance thereof by the defendant, plaintiff on November 16, 1936, entered into a contract with the defendant, represented by R. Park, Colonel, Corps of Engineers, contracting officer, for clearing lands above Dam No. 17 at the Locust, Mulberry, and Sipsey Forks of the Black Warrior River in Walker, Jefferson, and Cullman Counties in Alabama, at the unit price of $51.85 per acre and an estimated cost of $160,-838.70. The contract was subject to the written approval of the Division Engineer, Gulf of Mexico Division, was not to be binding until so approved, and was approved December 4, 1936, by F. N. Wilby, Col., Corps of Engineers, U. S. A., Division Engineer, Gulf of Mexico Division.

A copy of the contract and of the bid and accompanying papers, the specifications and map (with drawings thereon) made part of the specifications and contract, is made a part hereof by reference.

3. The specifications contain, among other things, the following provisions for information of bidders:

1-01. *Location.*—The locations of the work are on the Locust, Mulberry, and Sipsey Forks of the Black Warrior River and their tributaries, all lying in Walker, Jefferson, and Cullman Counties, Alabama. The locations are accessible by county roads or river and tributary creek. After reaching the river or tributary creek by county road, it is necessary in practically all cases to resort to a small boat to reach all sections.

1-02. *Work to be Done.*—(a) The work provided for herein is authorized by the River and Harbor Act approved May 15, 1936.

(b) The work to be done consists of furnishing all labor, material, tools, machinery, and appliances, and performing all work necessary to clear and burn or otherwise dispose of, but not place in river or creek, all trees, logs, and brush or other undergrowth on lands lying between the present low-water line, contour elevation 244 feet, above mean low Gulf, and contour elevation 260 feet, along the sections of the river and its tributary streams as follows:

Section No. 1: Locust Fork from its junction with the Mulberry Fork at Mile 408 to Atwood's Ferry, Mile 421.5, including all tributary streams.

Section No. 2: Locust Fork from Atwood's Ferry, Mile 421.5 to the St. Louis and San Francisco Railroad Bridge, Mile 430.5, including all tributary streams.

Section No. 3: Locust Fork from the St. Louis and San Francisco Railroad bridge, Mile 430.5, to the Louisville and Nashville Railroad bridge, Mile 439.5, including all tributary streams.

Section No. 4: Mulberry Fork from its junction with the Locust Fork at Mile 408 to Earnest Ferry, Mile 420.2, including all tributary streams except Lost Creek.

Section No. 5: Lost Creek from its Junction with the Mulberry Fork to the north boundary of Section 32 T. 15 S. R. 7 W., including all tributary streams.

Section No. 6: Mulberry Fork from Earnest Ferry, Mile 420.2, to and including Burnt Cane Creek, Mile 429.7, including all tributary streams.

Section No. 7: Mulberry Fork from Burnt Cane Creek, Mile 429.7, to the St. Louis and San Francisco Railroad Bridge, Mile 438.6, including all tributary streams.

Section No. 8: Mulberry Fork from the St. Louis and San Francisco Railroad bridge, Mile 438.6, to Phillip's Ferry, Mile 452.0, including all tributary streams.

Section No. 9: Mulberry Fork from Phillip's Ferry,

Mile 452.0, to the Mile 458.4, which is the East line of R. 5 W. T. 13 S., including all tributary streams.

Section No. 10: Sipsey Fork from Phillip's Ferry, Mile 452, to the mouth of Ryan's Creek, Mile 467.0, including all tributary streams.

Section No. 11: Valley Creek from its junction with the Black Warrior River at Mile 404.6, to the highway bridge at Toadvine, including all tributary streams.

(c) The funds available for payments to the contractors amount to $206,500.00. The United States reserves the right to increase, but not to decrease this amount. Should it be impossible to complete the work at the unit price of the accepted bid with funds available, the work to be done will be reduced by clearing only that area between the 244 and 257 foot contour in any or all sections.

(d) For purposes of acceptance, the area to be cleared has been divided into 20-acre subsections.

1–03. *Maps.*—The extent of the area to be cleared is shown on map marked "Black Warrior, Warrior, and Tombigbee Rivers, Alabama, Crest Gates Dam No. 17 Proposed Bank Clearing," which forms a part of these specifications, and is filed in the United States Engineer Office at Mobile, Ala., and the United States Engineer Sub-Office at Tuscaloosa, Alabama.

1–04. *Quantities.*—(a) The total estimated area necessary to be cleared for each section is as follows:

	Acres
Section No. 1, from low water line to contour elevation 260 feet	617
Section No. 2, from low water line to contour elevation 260 feet	189
Section No. 3, from low water line to contour elevation 260 feet	43
Section No. 4, from low water line to contour elevation 260 feet	419
Section No. 5, from low water line to contour elevation 260 feet	510
Section No. 6, from low water line to contour elevation 260 feet	534
Section No. 7, from low water line to contour elevation 260 feet	269
Section No. 8, from low water line to contour elevation 260 feet	234
Section No. 9, from low water line to contour elevation 260 feet	50
Section No. 10, from low water line to contour elevation 260 feet	115
Section No. 11, from low water line to contour elevation 260 feet	122
Grand total	3,102

The quantities represent the approximate volume of work to be done and will be used as a basis for the comparison of bids.

4. A copy of the map above mentioned (Spec. 1–03) was furnished prospective bidders. The map was old, having been made about 1909 and was in use in the Engineer Office as an index map. It was not a topographic or contour map and did not show elevations but, with the insertions made on it when it was reproduced to be sent out to prospective bidders on this contract, was more of a location or vicinity map, and indicated generally the location of the work with reference to towns, highways, railroads, etc., and also the limits of the 11 sections which were indicated on the map by river miles. It did not detail all of the tributaries and did not purport to indicate hills, depressions, gullies, sloughs or any other variations in the ground elevations. The work to be performed had been divided into eleven sections so that bidders could bid on one or more or all of the eleven sections at their options.

5. Paragraph 11 of the invitation for bids provided that bidders should visit the site and acquaint themselves with all available information concerning the nature of the materials in the areas to be cleared and form their own opinions of the amount of work involved and the difficulties to be encountered in its execution, and the local conditions having bearing on transportation, access and disposal, and provided further that failure to acquaint himself with all available information concerning these conditions would not relieve the successful bidder of assuming all responsibility for estimating the difficulties and costs of successfully performing the complete work as required.

Before submitting the plaintiff's bid, Mr. T. J. Clarke, president of plaintiff company, a civil engineer who had been in the contracting business for thirty years, and had had contracts with the Government for the building of levees and the clearing incident thereto, employed the services of the operator of an outboard motor boat who transported him over and along Mulberry and Locust Forks; over and along Valley Creek, Lost Creek, and some other waterways tributary to the forks mentioned. Trees and vegetation along the streams

requiring clearance were inspected by Mr. Clarke as well as the characteristics of the terrain. Prior to this inspection Government engineers and others had blazed trees along the main forks and up the tributaries of Locust Fork for the purpose of marking out and delineating the land lying below contour elevation 260′ and thereby indicating to prospective bidders the number, size and character of trees and undergrowth to be cleared, the location thereof and the character of the terrain from which their removal would be necessary. Mr. Clarke on some occasions ordered the motor boat stopped so that he could walk around and obtain a better view and an idea of the extent and character of the ground to be cleared and the probable difficulties of performance. He inquired of the boatman, who was acquainted with the territory, concerning the length of and topographic characteristics of the land along Prescott Creek, a small tributary not shown on the map referred to in paragraph 1–03 of the specifications. On one occasion during the same inspection Mr. Clarke talked to the Government engineer in charge of a field crew then engaged in blazing trees along the tributaries of Locust Fork in the vicinity of Atwood's Ferry. Mr. Clarke inquired if the work of clearing near Atwood's Ferry was representative or typical of the clearing work required at other places embraced in the specifications, to which inquiry the Government engineer informed Mr. Clarke that "he could not tell just what a typical example was" and that Mr. Clarke "would have to see some of the other work too—that he would have to see some of the worst and some of the best". The tributaries were visible and some were navigable by boat for some distance and all were accessible by walking from the three main forks. Some of the blazings on the trees were visible for a considerable distance and during the boat trip were visible to Mr. Clarke and his companions in the boat.

The day following the trip by motor boat, Mr. Clarke went over the ground by automobile. This trip carried him a short distance to landward from Locust, Mulberry and Sipsey Forks and to points situated along the upper reaches of the tributaries where a better view of the rugged terrain and of the number and size of trees and undergrowth thereon requiring clearance could be obtained.

6. After completing the inspection plaintiff submitted to the United States District Engineer a bid broken down into prices for individual sections and at the same time submitted an alternative bid naming a flat unit price per acre for all sections combined. The material part of the bid is as follows:

Item No.	Quantities for canvassing bids	Unit		Unit price	Amount
1	617	Acre	Section 1 as described in par. 1-02		
2	189	do	Section 2 as described in par. 1-02		
3	43	do	Section 3 as described in par. 1-02		
4	419	do	Section 4 as described in par. 1-02		
5	510	do	Section 5 all sections as described in par. 1-02		
6	534	do	Section 6 all sections as described in par. 1-02		
7	269	do	Section 7 all sections as described in par. 1-02	$51.85	$160,838.70
8	234	do	Section 8 all sections as described in par. 1-02		
9	50	do	Section 9 all or none as described in paragraph 1-02		
10	115	do	Section 10 all or none as described in paragraph 1-02		
11	122	do	Section 11 see below.		

I (we) wish to undertake not more than *all* sections of this work.

NOTE.—All amounts and totals given above will be subject to verification by the United States. In case of variation between unit bid price and totals shown by bidder, the unit price will be considered to be his bid.

We will accept Sections 2-3-7-8-9-10-11 alone, as a whole for the sum of $66.10 per acre, total amount $67,554.20.

We will also accept Sections 1-4-5-6 alone, as a whole for the sum of $46.35 per acre, total amount $96,408.00.

7. After submission of plaintiff's bid on September 22, 1936, plaintiff learned that there was a wide difference between the amount of its bid and the amount of the Government engineer's estimate for the work, and plaintiff's President and Col. Park, the district engineer, held a conference with the view of ascertaining whether or not plaintiff had made an error in its bid. During this conference they discussed the work to be performed and attention was called to the specifications. Plaintiff's President stated in effect that if the specifications would not be interpreted against the plaintiff with unreasonable strictness, as had been done in some other contracts with the Government, and if the specifications were correct, plaintiff was satisfied with the amount of the bid.

8. Pertinent parts of the contract and specifications, in addition to those shown in finding 3, are as follows:

CONTRACT.

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable

part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * * *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

SPECIFICATIONS.

1–05. *Commencement, Prosecution, and Completion.*—The contractor will be required to commence work under

the contract within 15 calendar days after the date of receipt by him of notice to proceed, to prosecute the said work with faithfulness and energy, and to complete it within 240 calendar days after said date of receipt of notice to proceed; provided that should the total number of acres to be paid for actually cleared under the contract exceed the number of acres for which bids will be canvassed as stated in paragraph 1–04 of these specifications, additional time will be allowed at the rate of 30 calendar days for each 12½% increase in number of acres in excess of such estimated quantity.

The monthly rate of progress to be maintained by the contractor will be determined by dividing the total number of acres to be cleared under his contract by eight.

In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, plus any extensions duly granted under articles 3, 4, 5 and 9 of the contract, the contractor shall pay the Government as liquidated damages the sum of $10.00 for each calendar day of delay irrespective of the number of sections included under his contract, until the work is completed or accepted.

1–08. *Physical Data.*—The fluctuations of the river between extreme high and low stages are approximately as follows:

Junction of the Mulberry and Locust Forks, 14 feet; Fort Birmingham, 26 feet, and Cordova, 40 feet. The low water season is usually from April 1 to December 1, but occasional rises in the river and creeks may be expected during this period. Hydrographs prepared from gauge readings at Lock No. 17 are available for inspection in the U. S. District Engineer Office, Mobile, Alabama, and the U. S. Engineer Sub-Office, Tuscaloosa, Alabama. The river and creek banks are steep, as a rule, and the terrain in general is rugged.

1–11. *Claims and Protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately, and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See Arts. 3 and 15 of contract.)

2–01. *Order of Work.*—The work is to be carried on at such localities and also in such order of precedence as may be found necessary by the contracting officer. The location and limits of the work to be done will be plainly

indicated by the contracting officer or his agents by stakes and ranges or otherwise, and gages will be established to show the stage of water with reference to the datum plans for clearing.

3–01. * * *

The contracting officer will furnish on the request of the contractor all survey lines, points, and elevations reasonably necessary for the work. All expenses of inspection, surveys, and superintendence will be borne by the United States.

4–02. *Method of Measurement.*—The area cleared will be measured by the acre in the field by inspectors appointed by the contracting officer.

The contractor is invited to be present in person or to be represented by an authorized agent during the measuring.

4–03. *Work Covered by Contract Price.*—The contract price per acre for clearing shall cover the cost of cutting and removing or disposing of all material, as specified in paragraphs 1–02 and 4–01 of these specifications.

9. Plaintiff commenced the work on November 25, 1936. The contract date for completion was fixed as August 1, 1937. The work was actually completed December 6, 1937. During the progress of the work under the contract, plaintiff was required by the field officer of the defendant, Mr. McCloud, representing the contracting officer, to clear, in addition to any areas lying directly on the stream, which were between elevations 244′ and 260′, all areas on gullies, sloughs, and tributaries of the main streams, which lay between those elevations. Plaintiff's agent orally complained and protested to the field officer against being required to clear the areas not actually within the areas shown as shaded or dotted on the map, and claimed that such work was outside the limits shown on the map upon which plaintiff relied in making its bid. He also called on Mr. Gatlin, senior engineer, and complained about it to him. He stated to Colonel Park that he was being required to clear other areas besides those indicated on the map by shading, and Colonel Park advised him that plaintiff should file its claim, stating that he would give it consideration. Plaintiff proceeded with the work until its completion.

The area cleared by plaintiff, consisting of tributaries, gullies, and sloughs, and extensions of distance along Wolf

Creek, Cane Creek, and Burnt Cane Creek, comprised a total acreage of approximately 1,446 acres of land, much of which was difficult to clear. The larger pieces of this acreage are shown in red on the map of the area. The map is in evidence as plaintiff's exhibit No. 2, and made a part hereof by reference. The actual cost of clearing this acreage was $78.00 per acre which was reasonable for the work.

The Government had estimated that there were 3,102 acres to be cleared, in all. Plaintiff actually cleared 3,733.23 acres. Included in this total number of acres were the 1,446 acres described above.

10. As the work progressed plaintiff was paid either monthly or semimonthly by voucher upon each of which was described accurately the number of acres in each section for which plaintiff was to be paid for work performed during the previous month or half month; the total amount to be paid plaintiff in each voucher having been calculated upon the basis of the aggregate number of acres cleared during the period covered by the voucher multiplied by the unit price of $51.85 per acre. Plaintiff signed each of the fifteen progress vouchers upon which was noted immediately above the signature of its corporate representative the words: "I certify that the above bill is correct and just and that payment therefor has not been received." The fifteenth voucher and the Government check for its payment were dated December 8, 1937, or two days after the work was completed. That and the previous fourteen vouchers covered all work performed between November 25, 1936, and November 30, 1937. The sixteenth or final voucher was prepared on January 18, 1938, covering work performed on 91.56 acres between November 30 and December 6, 1937, amounting to $4,272.64. Upon the final voucher plaintiff endorsed "Signed under protest."

11. Plaintiff was granted 49 days' extension of time on account of clearing 631.23 acres in excess of the 3,102 acres estimated by the specifications. Plaintiff also was granted three additional days on account of excessive rains and two additional days on account of interference with work by landowners. The sum of $730.00 was deducted from the final payment as liquidated damages on account of delay of

73 days net in completing the work beyond the extended completion date. The contracting officer's findings as to the facts and extent of the delays in question, including the finding that plaintiff was responsible for 73 days of delay, were duly communicated to plaintiff who never at any time appealed therefrom. An aggregate of $193,567.97 was paid plaintiff under this contract.

12. At no time during the progress of the work when the acreage measurements were being made in the field and monthly progress vouchers thereon were being prepared, did plaintiff protest in writing to the contracting officer that any part of the work it had performed lay outside of or beyond the shaded areas shown on the map. Plaintiff had complained orally as set forth in finding 9. It also filed a claim as set forth in findings 13 and 14.

13. On September 27, 1937, plaintiff filed a claim with the contracting officer as follows:

> We wish to file the following claim for damages or adjustment on our clearing contract above lock 17 on the Warrior River. On or about September 17th, 1936, after looking over the project by means of motorboat on the lower part of work and by automobile on the upper part and guided by the enclosed map that was furnished to us as a prospective bidder to show lands to be cleared, we filed bid covering price on each section and also combination of sections. Our bid was much below the Government estimate which caused the writer T. J. Clarke to call on Colonel Park and stated to him that it must have been that we did not understand what was required to fulfill this contract. The Colonel asked if I had looked over the work and my answer was yes, he also asked how I had planned to peform the work and I explained my plans to him. It seemed as though we understood each other and I told him that I would go ahead with the work.
>
> However it seems that we took for granted that the map given us as prospective bidders, showed the entire area to be cleared but we find it did not show a great number of gulleys and sloughs with an area of approximately one thousand (1,000) acres and a combined length of forty one (41) miles. These Gulleys and Sloughs were covered with heavy timber and brush, with steep

banks. (Enclosed please find typical section.) There were no open fields or corn fields in this area to help out the general run of work as in sections one and four located on lower portion of work on main river, but was more like sections nine and ten located on upper end of project. Now, our section price bid on sections nine and ten was $80.00 and $75.00 respectively per acre and our bid on sections one and four was $45.00 and $48.00 respectively per acre, therefore we are requesting you to pay unit price of $78.00 per acre on all of these Gulleys and Sloughs which were not shown on map given prospective bidders.

We feel this is just and right for had we known that these Gulleys and Sloughs were included in the contract we would have bid each area at $78.00 per acre and in turn would have raised our unit price on whole contract which was $51.85 per acre. Having lost quite a bit of money on this contract, we beg of you to give this claim much study and attention. Would be pleased to consult with you on this matter.

Colonel Park, the contracting officer, acknowledged receipt of the claim on October 6, 1937, as follows:

Reference is made to your letter of September 27, 1937, in which you submitted a claim for damages or adjustment on your contract for clearing above Lock #17 on the Warrior River.

Before your claim can be given proper consideration by this office it will be necessary for you to submit it in a more definite form. You should state the location and number of acres in each parcel of land for which you are claiming additional pay. The locations should be such that each parcel can be definitely located on the maps.

Your claim as presented in your letter of September 27 is very indefinite and does not bring out either one of the points that were discussed with you on your recent visit to this office. It was understood, at that time, that you were of the opinion that you should be paid for clearing all the area between contour 244 and the upper limit of the clearing regardless of whether contour 244 was above or below the low water line, and also that you should be paid a higher price per acre for lands cleared on creeks where the location map accompanying the specifications did not show definitely that

clearing work was necessary. You were informed, at that time, that a claim submitted by you on these two points would be given careful consideration by this office, but your claim will have to be presented in a more definite form than is contained in your letter of the 27th.

This office will take prompt action on your claim when it is submitted in the proper form.

On October 6, 1937, plaintiff wrote the contracting officer as follows:

> We understand that inspectors are now measuring acreage cleared by us under our contract with United States Government.
>
> We request that in arriving at the amount of clearing to be paid for under our contract with U. S. Government, that the measurements shall be taken as surface measurements in place of horizontal measurements, and it shall cover all surface between the 244′ Contour and the 260′ Contour as per our contract.

To this letter, Major Shaw for the contracting officer, replied on October 11, 1937, as follows:

> Reference is made to your letter of October 6, 1937:
>
> By letter from this office of October 6, 1937, you were informed that the claim for damages by you in your letter of September 27, 1937, could not be handled in the form in which it was submitted and it was suggested that you submit your claim in more detail in order that the various items claimed by you could be carefully checked by this office in order to permit a decision to be made. It is noted that in your letter of October 6 you mention two items that were referred to in letter from this office of October 6, but you still do not give detailed information, such as number of acres involved in your claim, the locations where measurements were not taken to your satisfaction, or the location of the acreage where the clearing work extended above the shaded area shown on the location map that was furnished you with the proposal.
>
> You are requested to consolidate all of your claims in one letter and give full information concerning each. This information is essential in order for this office to weigh your claim against facts as actually found in the field and against the requirements of the specifications.

On October 11, 1937, plaintiff furnished some additional data, stating as follows:

> In reply to your letter of the 6th, in which you ask that our Claim for damages or adjustment be submitted in a more definite form, wish to advise that we are attaching a list of each parcel with the location and the approximate acreage to accompany our claim on September 27th, 1937.

14. On November 1, 1937, plaintiff sent to the contracting officer a combined statement of its claims as follows:

> We wish to file the following claims for damages or adjustment on our clearing contract above Lock 17 on the Warrior River.
>
> *Claim #1*
>
> On or about September 17th, 1936, after looking over the project by means of motorboat on the lower part of work and by automobile on the upper part and being guided by the enclosed map and paragraph 1–03 of the specifications which states, "The extent of the area to be cleared is shown on map marked, Black Warrior and Tombigbee Rivers, Alabama, Crest Gates Dam No. 17 Proposed Bank Clearing," that was furnished us as a prospective bidder to show lands to be cleared, we filed bid covering price on each section and also combinations of sections.
>
> Our bid was much below the Government estimate which caused the writer T. J. Clarke to call on Colonel Park and stated to him that it must have been that we did not understand what was required to fulfill this contract. The Colonel asked if I had looked over the work and my answer was yes, he also asked how I had planned to perform the work and I explained my plans to him. It seemed as though we understood each other and I told him that I would go ahead with the work.
>
> However, it seems that we took for granted that the map given us as prospective bidders, showed the entire area to be cleared, but we find it did not show a great number of large sloughs, gulleys, and extension of sections with an area of 1,096 acres, and an approximate

length of 41 miles, and for your information a list is herewith given below:

Name	Section No.	Approximate mile No.	No. acres
Short Creek	1	419.0	54.00
Black Creek	1	417.5	30.00
Skeleton Creek	1	413.7	50.00
Coal Creek	1	412.5	55.00
Double Branch	1	411.0	20.00
Glaze Creek	1	410.0	32.00
Big Branch	1	408.8	47.00
Prescott Creek	1	408.5	147.00
White Branch	4	409.0	20.00
Alligator Br	4	413.0	15.00
Carradine Sl	4	414.5	16.00
Fannies Creek	5	Trb. Lost Creek	25.00
Bryants Creek	5	Trb. Lost Creek	15.00
Cane Creek	5	Trb. Lost Creek	25.00
Extension of upper end of Lost Creek			15.00
Indian Creek	5	Trb. Wolf Creek	10.00
Extension of upper end of Wolf Creek			40.00
Bakers Creek	6	421.0	65.00
Rattlesnake Creek	6	422.0	18.00
Skeeter Sl	6	424.5	12.00
Burnt Cane Creek	6	429.7	90.00
Bartons Creek	7	433.5	30.00
Horse Creek	7	434.5	60.00
Frog Ague Creek	7	438.0	20.00
Cane Creek	8	439.0	185.00

And, in addition to the above list there is also a great number of small sloughs and gulleys with a combined amount of approximately 350 acres, which is in addition to the above 1,096 acres, shown on the enclosed map. All these sloughs, gulleys, and extension of sections were covered with heavy timber and brush, with steep banks. There were no open cornfields in this area to help out, the general run of the work as in sections one and four located on lower portion of work on Main River, but was more like sections nine and ten, located on upper end of project. Now, our sections price bid on sections nine and ten was $80.00 and $75.00 respectively per acre and our bid on sections one and four was $45.00 and $48.00 respectively per acre, therefore, we are requesting you to pay unit price of $78.00 per acre on all of these gulleys and sloughs which were not shown on map given prospective bidders. We feel this is just and right for had we known that these gulleys, sloughs, and extension of sections were included in the contract we would have bid each area at $78.00 per acre and in

turn would have raised our unit price on whole contract which was $51.85 per acre.

Claim #2

We understand that inspectors are now measuring surface which has been cleared, and that they are not paying for all surface between 244′ contour and the 260′ contour in the following places listed below: (Here follow list of places).

Wish to state that in looking over the work it was our understanding that we would be paid for all surface between these two elevations.

Claim #3

We request that we shall be paid at the prescribed rate in contract on surface acres rather than land acres, as our bid was based on the amount of work to clear an acre of surface and not an acre of land, as in your bid proposal it asked for a price on an acre of clearing and not an acre of land to be cleared.

Having lost a large amount of money on this contract, we beg of you to give these claims much study and attention. We would be pleased to consult with you on this matter at your convenience.

The evidence shows that the following letter from the District Engineer addressed to plaintiff, dated November 17, 1937, was written but does not show that it was mailed to or received by plaintiff. Plaintiff became aware of its existence for the first time when a copy of it was filed on March 19, 1941, in response to plaintiff's call on the War Department for correspondence and also at the taking of testimony at Mobile, Alabama, on January 28, 1942:

Reference is made to your letter of November 1, 1937, in which you file claim for additional payments in connection with your Contract No. W–569–eng. 1499, with this office, for clearing lands to be submerged by backwater from crest gates on Dam No. 17, Black Warrior River, Ala.

Your claim is divided into three items as follows:

Claim No. 1 calls for an increased unit price for acreage cleared outside of the limits of the shaded area shown on map marked, "Black Warrior, Warrior & Tombigbee Rivers, Alabama, Crest Gates—Dam 17. Proposed Clearing."

Claim No. 2 states that the inspectors are not paying for all surface cleared between contour Elevs. 244.0 and 260.0.

Claim No. 3 requests that you be paid for surface areas rather than land area.

In connection with Claim No. 1, the area to be cleared was divided into 11 separate sections, in order that bids could be submitted as a whole for all the 11 sections or by section or combination of sections. The map referred to was furnished prospective bidders to show the limits of each section along the main stream and to give the prospective bidders information concerning the general location of the work to be done in each section, and, being a very small scale general map, the exact outline of the area to be cleared could not be shown. In Par. 1–02 (b) of the specifications, in the description of each section, the limits along the main stream are given and in all cases it is definitely stated that all tributary streams are included. It is, therefore, clear from the specifications that the area to be cleared on each section is the area lying between the low water line and contour Elev. 260 along the main streams between limits given and along all tributaries entering the river between these limits. The specifications also state that the quantities given in the specifications represent the approximate volume of work to be done.

The decision of this office is that requiring you to clear lands outside of the shaded portion shown on the map furnished with invitation for Bids was within the requirements of the contract and for this reason your Claim No. 1 is disapproved.

With reference to your Claim No. 2, the contract calls for the clearing of lands lying between the present low water line and contour elevation 260. It is assumed that by surface measurement you are claiming that the measurements should have been taken on the slope of the river bank, rather than horizontal. All land measurements are horizontal measurements and in addition to this, horizontal measure is also the common practice in measuring areas in clearing work. It is the intent and purpose of the specifications to use land measurements in measuring the area cleared under the contract, and there is nothing in the specifications to indicate that any method other than that usually used in measuring cleared areas would be used in this case.

The decision of this office is that horizontal measurement as used in taking up the areas cleared under the contract is the proper method and within the require-

ments of the contract, and for this reason your Claim No. 2 is disapproved.

With reference to your Claim No. 3, the specifications state that the area to be cleared is on lands lying between the present low water line, contour elevation 244, and contour elevation 260, along the river and its tributary streams. It is clear from this that the low water line is the lower limit of the area to be cleared. The elevation 244 given as the low water contour is for the purpose of giving the prospective bidder an idea of the approximate vertical distance between the low water line and the top limit of the area to be cleared. It is not the intention of the specifications to pay for water acreage, that is, acreage on shoals at the upper end of the various streams where contour elevation 244 crosses the stream and the low water surface is above elevation 244.

It is the decision of this office that the specifications clearly indicate that the low water surface is the lower limit of the area to be cleared. For this reason your Claim No. 3, which covers payment for water areas in the stream beds lying between elevation 244 and the low water surface, is disapproved.

Summarizing the above, the decision of this office is that the work required of you and the area for which you have been paid at the contract unit price is in accordance with the specifications covering this contract and no increased unit price or increased acreage due to the reasons given by you can be allowed.

On March 25, 1938, Captain Dunaway, acting for the contracting officer, wrote plaintiff as follows:

Your letter of March 15, 1938, relative to your claim for damages or adjustment in connection with your Contract No. W–569–eng–1499 with this office, for clearing lands above Dam No. 17, on the Black Warrior River, Alabama, has been received.

Action on this claim has been delayed by this office pending receipt of further supporting data which Mr. T. J. Clarke, of your company, stated that he would furnish. On several occasions, after receipt of your claim, Mr. T. J. Clarke discussed with the District Engineer the question of measuring area cleared on the slope, rather than the horizontal, and he was advised by the District Engineer that any evidence that could be furnished to show that it was customary to measure clearing areas on the slope on work similar to that performed under your contract would be given full consideration

and Mr. Clarke advised the District Engineer that he was having this supporting data prepared and would submit it to be considered along with the original claim. This data has not been received.

On receipt of any further data supporting your claim that you care to submit, or on receipt of a statement from you that you do not care to furnish further data, prompt action will be taken on your claim.

For the District Engineer:

On March 28, 1938, the contracting officer wrote plaintiff as follows:

> Your letter of February 11, 1938, to the Commissioner of Labor Statistics, Washington, D. C., has been referred to this office for reply.
>
> As stated in letter from this office dated March 25, 1938, action on your claim in connection with your contract No. W-569-eng-1499, for clearing work above Dam No. 17 on the Black Warrior River, Alabama, has been delayed, pending receipt from you of evidence supporting your claim that it is customary to measure cleared areas on the slope of the bank rather than the horizontal. As stated in the letter referred to above, prompt action will be taken on your claim when this supporting evidence, or a letter stating that you have no further evidence to present, is received from you.

The District Engineer, Colonel Park, who was the contracting officer, on July 20, 1938, made his report to the Chief of Engineers, through the Division Engineer, Gulf of Mexico Division, on plaintiff's claim in a communication reading, in part, as follows:

> WAR DEPARTMENT,
> UNITED STATES ENGINEER OFFICE,
> MOBILE, ALA., *July 20, 1938*.
>
> Subject: Claim of Clarke Brothers Construction Company for clearing lands above Dam No. 17, Black Warrior River, Ala.
>
> To: The Chief of Engineers, U. S. Army, Washington, D. C. (Through the Division Engineer, Gulf of Mexico Division.)
>
> 1. There are inclosed herewith letters from Clarke Brothers Construction Company dated November 1, 1937 and April 27, 1938, presenting their claim for additional payments on work performed under Contract No. W-

569–eng. 1499, dated November 16, 1936, for clearing land above Dam No. 17, for transmittal to the General Accounting Office for necessary action in accordance with the provisions of paragraph 766.1, O. & R.[1]

2. While the provisions of the specifications appear clear and comprehensive and the scope and intent thereof were specifically invited to the attention of the contractor prior to award of the contract to him, this office is of the opinion that his claim has some merit for the following reasons:

a. The contractor's bid on which the contract was awarded amounted to $160,838.70, while the Government estimate for doing the work amounted to $310,200.00, and the bid of the next lowest bidder amounted to $276,215.00.

b. The map which accompanied the invitation for bids did not definitely show the limits of the entire area to be cleared, in that the said map failed to show the sloughs, gullies, and some of the smaller tributary creeks.

c. According to the records of the contractor, the performance of the work under this contract resulted in a loss to him of approximately $90,000.00.

d. The work was prosecuted diligently and was completed in a very satisfactory manner, there being no attempt on the part of the contractor, in spite of his low bid, to evade any of the provisions of the specifications.

3. There are given below the comments and recommendations of the District Engineer, in regular order, upon the three points listed by the contractor in presenting his case to this office:

Claim No. 1

The contractor is correct in his statement that the entire limits of the area to be cleared were not definitely shown on the map which accompanied the invitation for

[1] Paragraph 766.1 appears in Orders and Regulations, Corps of Engineers, U. S. Army, Chapter VII, as follows:

766.1. Procedure.—Since it is in the interests of claimants to secure the settlement of claims, particularly in small amounts, without the formality of suit, all claims arising from or growing out of the activities of the Engineer Department should be submitted in the first instance to district engineers. District engineers will investigate such claims and submit their reports and recommendations through division engineers to the Chief of Engineers. Such claims as may be settled by the Chief of Engineers with or without the approval of the Secretary of War will be returned to the district engineer for payment. Claims which may not be settled under authority conferred upon the War Department will be transmitted by the Chief of Engineers to the General Accounting Office for direct settlement. The correspondence transmitting the report will indicate the official appropriation symbol and title involved.

Claims arising from or growing out of the contractual relationship, requiring settlement by the General Accounting Office or the courts, can be materially reduced in number by a diligent application of the procedure provided by the terms of contracts for the settlement of disputes as the work progresses.

bids, in that the said map did not show the sloughs, gulleys, and some of the smaller tributary creeks. The map which accompanied the invitation for bids was a reproduction of the general index map prepared by this office from the survey of 1909, and was used because it was impracticable to make another survey of the area from which to compile a map in more detail than that shown, except at prohibitive costs and requiring so much time in its preparation as to unquestionably delay the completion of the clearing work and thus prevent operation of the crest gates to raise the pool level. At the time of advertising the work the fact that the map referred to did not show the limits of the area to be cleared was known to this office, and its use was intended only to indicate generally the eleven sections of land to be cleared, so that bids could be solicited on either individual lots or for the entire project. In this connection attention is invited to Paragraph 1–02 (b) of the specifications, which indicates that all tributary streams are included in these sections, and to Paragraph 11 of the invitation for bids, which reads as follows:

"*Investigation of Conditions.*—It is expected that bidders will visit the site and acquaint themselves with all available information concerning the nature of the materials that will be encountered in the areas to be cleared and to form their own opinion of the amount of work involved and the difficulties to be encountered in its execution, and the local conditions having bearing on transportation, access, and disposal. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for estimating the difficulties and costs of successfully performing the complete work as required."

The area affected by Claim No. 1 has been estimated by the contractor at 1,446 acres, and in his presentation he represents the total number of acres involved to be that area not defined on the map, and for which, in his claim, he contends that he should be paid at the rate of $78 per acre. On this basis the monetary consideration involved would amount to $37,812.90, arrived at by multiplying the number of acres by $78.00 and deducting therefrom the amount paid to the contractor for the same number of acres at his contract price of $51.85 per acre. Since the map which accompanied the invitation for bids was drawn to such a small scale and did not definitely outline the entire area to be cleared, it was necessary for this office to review and planimeter ap-

proximately 350 plane table sheets on which payments to him had been based, in order to determine whether or not the acreage involved in the contractor's claim was correct or reasonable. The check made by this office indicates that the estimate of 1,446 acres claimed by the contractor is both reasonable and conservative.

The price of $78.00 per acre claimed by the contractor for that area not specifically outlined on the map appears entirely reasonable, in view of the fact that the lowest bid per acre on any one of the sections by the next lowest bidder was $85.00 and in the Government estimate $98.50.

Although the contractor stated upon several occasions during the life of his contract that he intended to file a claim for additional payments thereunder, he did not present his claim in writing until November 1, 1937. The work was accepted by the contracting officer on December 6, 1937, and final payment under the contract was made on January 22, 1938.

It is manifest to this office that the work of clearing the banks of the gulleys, sloughs, and tributary streams, the limits of some of which were not definitely shown on the map, was much more costly than that of clearing the banks of the main waterway, and it appears entirely logical for the contractor to claim a higher cost per acre for any clearing work performed by him in such areas if, as he contends, he was misled by the information contained in the map which accompanied the invitation for bids and as a result thereof could not make a complete reconnaissance of the gullies, sloughs, and tributary creeks. He had no advance information of the conditions to be encountered in these rugged sections and was not, therefore, in position to submit an equitable bid to cover these areas.

In view of the foregoing, the District Engineer is of the opinion that this claim of the contractor is meritorious and recommends that the sum of $37,812.90, computed as above outlined, be paid to him.

Claim No. 2

The lands affected by Claim No. 2 are those lying along the upper limits of both the main stream and all of the tributaries thereof, and in this connection attention is invited to paragraph 1–02 (b) of the specifications, which reads in part as follows:

"* * * to clear and burn or otherwise dispose of, but not place in river or creek, all trees, logs, and brush or other undergrowth on lands lying between the pres-

ent low-water line, contour elevation 244 feet, above mean low Gulf, and contour elevation 260 feet * * *"

* * *

This claim of the contractor would entail payment for the beds of the streams which lie above the closure of the 244 feet contour, and since this is, in the opinion of the District Engineer, not only contrary to the provisions of the specifications, but a departure from the established methods of measuring similar clearing operations, the claim is without merit and its disapproval is recommended.

Claim No. 3

The contractor, at the time of presenting this claim, stated verbally that he would furnish additional evidence in support of his contentions. His letter of April 27, 1938, is self-explanatory and in view thereof, it is recommended that no further cognizance be taken of claim No. 3.

4. Before making award to the Clarke Brothers Construction Company for the clearing work involved in the instant contract, a thorough investigation of their past performance in the execution of similar and other types of contracts with the Government and private parties, was made. The reports received by this office in response to its specific inquiries as to the reliability, competency and adequacy of its bids, revealed conclusively that the firm bore an excellent reputation for past performances and that in no single instance had the contractor defaulted in the performance of any of its contractual agreements.

5. Since the presentation of these claims has been delayed due to the failure of the contractor to furnish until April 27, 1938, the additional information in support of his claim No. 3, and to the time required by this office in checking the acreage involved in his claim No. 1, it is requested that action hereon be expedited.

R. PARK,
Colonel, Corps of Engineers,
District Engineer.

Colonel F. B. Wilby, Division Engineer, Gulf of Mexico Division, also in transmitting the report of the District Engineer to the Chief of Engineers, made his report as follows:

The contractor's claim No. 1 is based on the fact that the map given prospective bidders failed to indicate the

whole area to be cleared, omitting a large number of sloughs, gullies, and extensions of sections totaling 1,446 acres. His contention is correct, although paragraph 1–03 (maps) of the specifications states: "The extent of the area to be cleared is shown on the map marked 'Black Warrior, Warrior, and Tombigbee rivers, Ala., Crest Gates Dam #17, proposed bank clearing,' which forms a part of these specifications, * * *." Neither the invitation nor the specifications contained a statement to the effect that the map was not complete in its description of the areas to be cleared and that it was for use merely in describing generally the 11 sections of the land to be cleared. Although paragraph 1–02 (Work to be done) lists by miles to given points the sections in which clearing is to be done along the river, its forks, and Lost Creek, and Valley Creek, it does not, by number of streams or names, indicate a large number of tributary creeks, branches, gullies, etc., and the approximate extent of area along each to be cleared merely stating that the section includes all tributary streams.

On November 17, 1938, the Chief of Engineers transmitted the claim to the Comptroller General with the following endorsement:

1. The accompanying claim of Clarke Brothers Construction Company, for additional compensation in connection with the work of clearing lands to be submerged by backwater from Dam No. 17, located on Locust, Mulberry, and Sipsey Forks of the Black Warrior River, in Walker, Jefferson, and Cullman Counties, Alabama, under contract No. W–569–eng–1499, dated November 16, 1936, is referred for direct settlement by your office.

2. The contractor presents three claim items for which it alleges it is entitled to additional compensation. These items are: (1) Payment of $37,812.90 representing an increase from the contract price of $51.85 per acre to $78.00 per acre for the additional work of clearing 1,446 acres of land for the reason the drawings furnished it at the time it submitted its bid did not show all the creeks, sloughs, and gulleys which were within the area to be cleared. (2) Payment for the total area, including the creek and river beds, within the stipulated limits. (3) Payment for the total surface area of the land cleared by it rather than the horizontal projected area as used by the District Engineer.

3. With reference to (1) it is noted that both the Division and District Engineers are of the opinion that the contractor is entitled to additional compensation in the

amount of $37,812.90. Their recommendation is based upon the fact that the map did not show all of the creeks, gulleys, and sloughs and that the contractor had every reason to believe that he would be required to clear only such areas as were indicated thereon; and that in view of the short period of time between the issuance of the invitation for bids and the date stipulated for opening of bids, prospective bidders were unable to make a reconnaissance of the area in question and thus ascertain the exact amount of work required by them. This office does not concur with either the District or the Division Engineers in their recommendations on this item. It is the opinion of this office that paragraph 11 of the Invitations for Bids requiring the contractor to investigate the site of the work is binding upon it. The fact that it might not have been able to cover the entire area within the limited period of time is not justification for increasing the remuneration stipulated in the contract. The contractor was not forced to submit a bid but did so of its own volition. Furthermore, paragraph 1-02 of the specifications describes each section to be cleared as "including all tributary streams." That the contract covered work in the tributary areas between the specified contours is beyond question, and the failure of the bidder to properly estimate the difficulties of performance is its responsibility. A very casual investigation of the general characteristics of the terrain would have established the fact the small scale map referred to in paragraph 1-03 of the specifications did not show in detail the work to be done.

4. With reference to claim items Nos. 2 and 3, this office concurs in the reasons and recommendations advanced by the District and Division Engineers in their prior indorsements thereon.

5. As an additional element in the consideration of the above claims, attention is invited to paragraph 1-11 of the contract specifications which states: "If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decisions immediately, and then file a protest with the contracting officer against the same within 10 days thereafter or be considered as having accepted the record or ruling." As the contractor failed to avail himself of this provision, it is the opinion of this office that he has forfeited his right to the consideration that otherwise could have been accorded him.

The Acting Comptroller General on January 18, 1939, wrote the plaintiff a letter denying its claim.

15. The papers, including the specifications and the map, furnished by the Government to the plaintiff before the plaintiff made its bid, were not reasonably susceptible of the interpretation that the only clearing which the successful bidder would be expected to do would lie within the area of the shaded or dotted portion of the map.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff corporation made a contract with the Government to clear lands on certain forks of the Black Warrior River in Alabama, which lands were to be covered with water upon the completion of Dam 17, on the river. The invitation for bids included a copy of the proposed contract, a copy of the specifications, and a map. Paragraph 1-03 of the specifications was as follows:

> *Maps.*—The extent of the area to be cleared is shown on map marked "Black Warrior, Warrior, and Tombigbee Rivers, Alabama, Crest Gates Dam No. 17 Proposed Bank Clearing," which forms a part of these specifications, and is filed in the United States Engineer Office at Mobile, Ala., and the United States Engineer Sub-Office at Tuscaloosa, Alabama.

The map so mentioned was a reproduction of a general index map which had been prepared by the War Department Engineer's Office for that area in 1909, which showed the township and range lines, the important streams, the railroad, ferries, and towns of the vicinity. It had, when it was issued to bidders, marks on it dividing the clearing work into eleven sections, since the invitation asked for separate bids upon each section, as well as for bids for the entire project. The bids requested were not for lump sum prices for the whole job or for each section, but for the price per acre at which the bidder would do the job.

The map also had placed on it, before it was reproduced to be sent out to prospective bidders, an area of shading, made by small black dots, running in uniform width of about one-

eighth of an inch along each side of those parts of the streams which were shown on the map, as parts in which the water level was to be raised by the impounding of the waters at Dam 17.

Paragraph 1–04 of the specifications, quoted in finding 3, stated the "total estimated area necessary to be cleared" in acres by sections and for the whole project. The figure given for the whole project was 3,102 acres. It then stated that "the quantities represent the approximate volume of the work to be done and will be used as a basis for the comparison of bids."

The plaintiff, after an inspection of the site of the work by its president, T. J. Clarke, bid $51.85 per acre for the entire project. When the bids were opened, the plaintiff learned that its bid was much below that of the next lowest bidder, which was $85.00, and still farther below the Government's estimate of the fair price of the work, which was $98.50. The plaintiff's president therefore had a conference with Col. Park, the District Engineer who was the contracting officer, with regard to whether the bid had been affected by any misapprehension as to the work required. The plaintiff's president inquired as to how meticulous a job of raking up twigs, etc. would be required, and on being assured that nothing unreasonable would be required, he said that if the specifications were correct the bid could stand as made.

When the work was under way, the plaintiff complained orally to representatives of the Government that a good deal of the land to be cleared lay along or in creeks, gullies, and sloughs extending back considerable distances from the streams shown on the map; that these areas were relatively inaccessible and heavily wooded and therefore the price per acre which the plaintiff had bid for the whole project was not sufficient, and an addition to that price should be made for as many acres as lay outside the area which, the plaintiff claims, the map showed.

The basis of the plaintiff's claim, then, is that it was misled by the map which the Government furnished to bidders, because the map led it to believe that all the clearing to be done was in a narrow strip along the banks of the streams shown on the map, the strip being indicated by the shading

on the map; that in arriving at the price which it bid per acre it did not take into account the clearing along small tributaries, gullies, and sloughs, which clearing turned out to be more difficult and expensive than the average clearing in the strip close to the main streams. The Government answers (1) that the plaintiff was not misled and (2) that if it was misled, it was not reasonably misled, since the map, together with the accompanying papers, could not reasonably be interpreted as the plaintiff claims it interpreted them.

We have already described the map and quoted paragraph 1–03 of the specifications, which referred to the map. Paragraph 1–02 of the specifications said:

> *Work to be done.*— * * *
>
> (b) The work to be done consists of furnishing all labor, material, tools, machinery, and appliances, and performing all work necessary to clear and burn or otherwise dispose of, but not place in river or creek, all trees, logs, and brush or other undergrowth on lands lying between the present low-water line, contour elevation 244 feet, above mean low Gulf, and contour elevation 260 feet, along the sections of the river and its tributary streams as follows:
>
> *Section No. 1:* Locust Fork from its junction with the Mulberry Fork at Mile 408 to Atwood's Ferry, Mile 421.5, including all tributary streams.
>
> * * * * *

A similar statement ending with the words "including all tributary streams" followed for each of the eleven sections.

As shown in finding 5, paragraph 11 of the invitation for bids provided that bidders should visit the site of the work and acquaint themselves with all available information concerning the nature of the materials in the areas to be cleared, and should form their own opinions as to the amount and difficulty of the work and the local conditions bearing on transportation access and disposal. It said that failure to acquaint himself with all available information concerning these conditions would not relieve the successful bidder of assuming all responsibility for estimating the difficulties and costs of successfully completing the work.

The plaintiff's reply, as to these provisions of the invitation for bids and the contract, is that the shading on the

map was a specific representation of the area in which the work was to be done, and that it relied on it as such. The plaintiff points to the language of paragraph 1-03 of the specifications, which we have quoted, which says "The extent of the area to be cleared is shown on map * * *" and says that that language, together with the map, is the direct statement on which it relied.

If, after reading this language, and opening the map, the reader had found a contour map showing the line of elevation 260 ft. in the neighborhood of the streams, but at greatly varying distances from the streams, as a contour map would necessarily show, then the plaintiff's alleged reading of the words quoted above would be understandable. But when, as in this case, the map, when opened, showed no elevations whatever, but only a shaded area of uniform narrow width along large streams, then the quoted language did not and could not mean what the plaintiff claims, for it would be a contradiction of the simplest facts of nature. What all bidders, including the plaintiff, knew was that the purpose of the proposed contract was to remove the natural growth in the area which would be covered when the water was impounded at a dam downstream. They knew that over many miles of the courses of streams there would be great variations in the elevations of banks and adjacent land. They knew that creeks flow into streams at many places along their courses, and that few if any of them tumble down sixteen-foot waterfalls, or over rapids aggregating that height, so that their beds a short distance back from the streams into which they flow are sixteen feet higher than the levels of those streams. They knew that gullies and marshy areas are found adjacent to larger streams and their tributaries. They knew that the one who got the contract for this clearing was to do it all, not only the part of it which happened to lie close to the main streams, leaving a large additional job of clearing to be done by someone else.

The plaintiff does not, apparently, claim that it understood that it was to clear everything which lay within the shaded area, even though it was above elevation 260, as some of it might well have been. It apparently contends that the word "extent" upon which it claims it relied, meant that nothing

outside the shaded area was within the contract, though not everything within the shaded area was within the contract. Though the plaintiff has computed the acreage of all the clearing it did outside the shaded area, it does not tell us how wide the shaded area was. It is, on the map, so vague in its outline that it would be difficult to apply to it the scale given on the map, with accuracy.

The plaintiff's president, who was a civil engineer and a contractor of thirty years' experience, who had built levees under contracts with the Government and had done the necessary clearing incident thereto, went over some sixty miles of the courses of these streams in a motor boat, before he prepared the plaintiff's bid. He also went to other parts of the area in an automobile. He says that the gullies and creeks leading into the streams that he toured were filled with bushes and overhanging vines, so that he could not see how far they extended. That, of course, would be no reason why he should assume that what lay behind the screen of vegetation was a state of affairs which in fact never existed anywhere. He must have guessed what the condition was which he could not see, and he may have underestimated the cost of clearing such areas. But he was specifically notified by the contract papers, as he must have known without such notice, that he must take the responsibility for the correctness of his estimate.

We have not made a finding as to what was in the mind of the plaintiff's president when he made the plaintiff's bid. What he claims was in his mind is so contrary to any reasonable interpretation of the contract documents that it could not determine the meaning of the contract. It is therefore irrelevant to the issue of the interpretation of the contract.

The plaintiff claims that Article 15 of the contract, which is quoted in finding 8, is applicable. That article lodges with the contracting officer the power to decide all disputes concerning questions of fact arising under the contract, subject to written appeal by the contractor to the head of the department or his representative. After the plaintiff had made its claim in definite form, Colonel Park, the District Engineer who was the contracting officer, addressed a report to the Chief of Engineers, through the Division Engineer of

the Gulf of Mexico Division, about the claim. That report appears in finding 14. It does not purport to be a decision under Article 15, since it is not addressed to the contractor, but to the Chief of Engineers, and concludes with a recommendation rather than a decision. If the contracting officer was passing the question on to higher authority, with a recommendation, and not deciding it, the contractor would not have been bound by his recommendation, if it had been adverse to the contractor, and the Government would likewise not have been bound by it, it being adverse to the Government. We think that the contracting officer was only passing the question on to higher authority, a not uncommon practice in such cases.

In our finding 14 we have quoted a letter written by Col. Park, the District Engineer, to the plaintiff. The proof does not show that this letter was mailed to or received by the plaintiff. The letter is included in the findings for the purpose of showing that Col. Park, the contracting officer, knew exactly how to make a decision under Article 15 of the contract, when in fact he intended to make a decision, and not a mere recommendation to higher authority. In that letter, after the discussion of the facts of the claim here in suit he concluded with the following paragraph:

> The decision of this office is that requiring you to clear lands outside of the shaded portion shown on the map furnished with invitation for Bids was within the requirements of the contract and for this reason your Claim No. 1 is disapproved.

A similar formal decision was written at the end of the discussion of each of two other claims made to the contracting officer by the plaintiff, and a final paragraph was appended summarizing the three decisions.

The later writing of July 20, 1938, made by Col. Park, the contracting officer, and which the plaintiff claims to be a decision in its favor under Article 15 of the contract, also appears in finding 14. It was not written in the form of a decision, but of a recommendation. It was not addressed to, or communicated to the plaintiff, as a decision under Article 15 would naturally have been. The action recommended did not, as to claim 1, follow naturally from the facts stated,

except upon the assumption that the action was to be taken by some higher authority which could, in disregard of the contract, take into consideration the facts that the plaintiff had bid too low, had done a good job, and had lost money in doing it, and therefore give the plaintiff some additional compensation. We think the District Engineer recognized that he had no power to make a decision on such a basis, and therefore passed the question, with a recommendation, to the General Accounting Office, where, he apparently thought, such a decision could be made, if it could be made anywhere.

We see no reason for twisting the District Engineer's recommendation into a decision by him as contracting officer under Article 15. We would not do so against a contractor if the decision were adverse to him. Neither the contractor nor the Government has such a vested right in an erroneous decision by a non-judicial person, that it can claim that every utterance by him in its favor is a decision under Article 15. To have one's case decided on its merits by a judicial tribunal is not an intolerable fate, that ought to be avoided by strained construction.

If we assume, contrary to what we have said, that the contracting officer intended to make a decision under Article 15, we encounter a serious question as to whether he had the power to bind the parties by such a decision as his letter made. We suppose that decisions under Article 15, like those of arbitrators, administrative officers or boards, and quasi-judicial agencies, must take some shape in which the decision logically flows, according to applicable law, from the facts found. The applicable law in this case is the law of contracts. The only factual basis which occurs to us for the award of money to the plaintiff on its claim would have been that the plaintiff was reasonably misled, to its damage, by representations made by the Government. The contracting officer, in his narrative preceding his recommendation, did not even find that the plaintiff was misled. He said "* * * and it appears entirely logical for the contractor to claim a higher cost per acre for any clearing work performed by him in such areas, if, as he contends, he was misled by the information contained in the map * * * ." We think it is not proper to imply, from this expressly conditional lan-

guage, that the contracting officer was, awkwardly, saying that the plaintiff had been misled. The letter certainly does not say that the plaintiff had been misled, and there is little, if anything, in it from which to imply that the contracting officer thought it had been misled. But again assuming that we should imply a finding that the plaintiff had been misled, still no right under the contract would follow unless the plaintiff's being misled by the contract papers was reasonable.

The contracting officer's letter comes nowhere near to such a finding. If he had made it, it would have been without any rational basis. For us to imply that he found it, when in our opinion such a finding would have been wholly without support, would show that we were willing to impute to him, from his silence, a finding that we would under no circumstances father as our own.

It may well be that the contracting officer was not aware of the requirement that one must have been reasonably misled by an innocent misrepresentation in order to have a right to compensation for resulting loss. It is a doctrine that one learns from law books, not from engineering treatises or practice. But whether his omission to find this essential fact was intentional, or due to ignorance of its necessity, a decision for the plaintiff could not, under the law of contracts, have been made without it. If, without it, such a decision were made by a jury, or a trial judge, or an administrative or quasi-judicial tribunal, it would be promptly set aside by a reviewing court. If, under Article 15, a contracting officer has the power to give away the Government's money when, under the facts and the law, the Government owes nothing, or to destroy a claim of a contractor, valid under the facts and the law, he has a unique power indeed. It is perhaps conceivable that a contractor, a private person, could validly agree to lodge such a power in the contracting officer. But we think it would be clearly illegal for a department of the Government to subject the public funds to such a power.

We are asked to twist language of recommendation to superior officers into language of decision made upon the contracting officer's own responsibility; to fill in gaps in findings of facts by imputing to the contracting officer things which he did not say; all to what end? To prevent ourselves from

deciding this case upon its merits. We think the result is hardly worthy of the effort which would have to be made to reach it.

Our decision on the merits is that the plaintiff, if it read the contract papers as it claims it did, did so unreasonably, and that the contract which the parties made was that the plaintiff would, for the bid price per acre, clear all land lying between elevations 244 and 266.

The plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting: Upon the facts of record I am of opinion that we are without authority to overturn the findings and decision of the contracting officer, Colonel R. Park, of July 20, 1938, set forth in finding 14. This decision is referred to in the findings as the contracting officer's report to the Chief of Engineers, but I do not think that it was merely a report or recommendation. The contracting officer was authorized and required by the contract to decide the questions submitted to him in Claim 1, and he made findings and a decision thereon in the exercise of his independent judgment, as he was required to do by art. 15 of the contract, and plaintiff accepts the decision and bases its total claim for judgment for $37,812.90 upon his findings and decision. We cannot reject the decision of the contracting officer unless it was so grossly erroneous as to imply bad faith. Claim 1 was not a claim for unliquidated damages for breach of contract beyond the jurisdiction of the contracting officer to decide under the rule stated in *Wm. Cramp and Sons Ship and Engine Building Co.*, v. *United States*, 216 U. S. 494, 500. In my opinion a finding of gross error may not be made. Colonel Park acted with full knowledge of all the facts and with entire good faith. The question with which we are met at the threshold of the case is, therefore, Was this a decision on a dispute concerning questions of fact? If it was such a decision, it is final and we should enforce it by entering judgment upon it as a court would upon a verdict of a jury.

The contracting officer gave full consideration to all the facts relating to plaintiff's claim and held that in his opinion plaintiff had been misled by the Government. After setting forth what he considered to be the essential facts, he concluded with the decision that "In view of the foregoing, the District Engineer is of the opinion that this claim of the contractor is meritorious and recommends that the sum of $37,812.90, computed as above outlined, be paid to him." This was an ultimate finding in favor of the contractor that it had been reasonably misled on the dispute made in Claim 1 concerning questions of fact which had arisen and which were presented to him for decision. The questions presented and decided were, therefore, "disputes concerning questions of fact" under art. 15, and the decision, being in favor of the contractor, was final and conclusive without appeal and could not be reviewed or reversed by the Chief of Engineers or the head of the department, except on the ground of fraud.

The questions which gave rise to the dispute, and which the contracting officer decided, were whether the contractor had been misled, and whether its claim that it had been so misled was reasonable and logical under the facts as presented by the contractor, or as obtained and considered by the contracting officer. These were questions of fact which in the ordinary case in a suit on that ground under the contract would be submitted to and decided by the jury. The contracting officer resolved these questions in favor of the contractor and concluded as an ultimate finding that the contractor had been misled; that it was reasonable for him to have been misled, and that plaintiff was therefore entitled to the additional compensation of $37,812.90, which was the actual excess cost of $26.15 an acre in addition to the bid price of $51.85 an acre for clearing 1,446 acres which the contractor claimed and the contracting officer determined to be the area with respect to which the contractor had been misled by the information conveyed in the documents accompanying and forming a part of the contract. The amount of compensation to which the contractor was reasonably entitled on the finding that it had been reasonably misled was also a question of fact. In numerous cases decisions on

such questions in favor of the Government have been enforced by the courts against the contractor, except where a finding of implied bad faith was justified.

The facts of record which appear to have been before the contracting officer, and which he considered and acted upon in deciding plaintiff's claim, show that Claim 1 made by plaintiff, which was the only claim allowed by the contracting officer for additional compensation, measured by the difference between $78 an acre and its bid price of $51.85 an acre for 1,446 acres, was based upon the claim that plaintiff had been justifiably misled at the time it made its bid as to this number of acres, and not that this area of 1,446 acres which plaintiff had also been required to clear along with other areas, all of which totaled 3,733.23 acres, was outside the requirements of the contract as properly interpreted and construed. This latter question, if it was ever raised at all, had already been disposed of by the construction engineer and by Mr. Gatlin, assistant to the contracting officer, and accepted by plaintiff. The record shows that the contracting officer also decided this question on November 17, 1937, but since plaintiff never received the letter dated November 17, and it was not sent to the Chief of Engineers, Colonel Park apparently concluded not to mail the letter and to keep under consideration for further action plaintiff's Claim 1 that it had been misled. The contracting officer and plaintiff throughout, and until the decision of July 20, 1938, considered and treated Claim 1 to be based on the contention made by plaintiff that it had been misled.

The contracting officer was thoroughly familiar with the provisions of the specifications and he obviously did not consider Claim 1 of the plaintiff to be a claim for payment for "work required of him outside the requirements of the contract" within the meaning and purpose of para. 1–11 of the specifications, and in this he was entirely correct. A claim by the contractor that he had been reasonably misled and was entitled to a higher rate of pay than the price bid for the areas as to which he had been misled clearly was not a claim for work which the contractor considered to be outside the requirements of the contract. Plaintiff was asking for an increase in the bid price to cover actual cost, and

not for a new price plus profit for extra work outside the contract. The facts show that plaintiff before and at the time it made its claim, first, on September 27 and, in more detail, on November 1, 1937, had been advised that these disputed areas outside the areas covered by the limits of the shaded portion on the contract drawing, or map, were within the requirements of the contract under the provisions of para. 1–02 of the specifications quoted in finding 3. Plaintiff accepted this ruling without filing any protest or claim specifically on that ground, but that did not dispose of the matter of plaintiff's claim that as to these areas it had been misled. These rulings as to what was required of plaintiff by the contract specifications meant that plaintiff was to clear all areas between 244 and 260 feet whether within or outside the shaded portion of the map at the contract price of $51.85 an acre, unless plaintiff had been misled.

The protest which plaintiff made early in September 1937 to the contracting officer personally, as a result of which plaintiff was told to file its claim and that it would be considered, and as a result of which protest plaintiff soon thereafter filed its claim, was, as above stated, not that the areas as to which it was complaining were outside the work required by the contract as it had been interpreted but that it had been misled by the information disclosed by the map and that, as a result, the bid price of $51.85 an acre was too low to cover cost, because these areas were more difficult and more expensive to clear. The contracting officer therefore did not have before him when he made his findings and decision on July 20, 1938, on plaintiff's claim any question of law as to the proper interpretation or construction of the scope and requirements of the contract specifications. The preliminary statement of the findings and opinion on plaintiff's Claim 1 shows this to be true. In para. 2 of the preliminary statement of his opinion the contracting officer accepted this view of the contract which he had previously expressed as a basis for his findings and opinion on the questions of fact presented in Claim 1. But assuming that the question of the construction of the contract was one of the questions necessarily before the contracting officer and that in his decision of July 20 he also decided that question of law, still

his decision under the contract on the other questions of fact, including the fact as to the reasonable additional amount due, would be final and conclusive. If that question of law was necessarily before the contracting officer in the claim decided, he decided it correctly and no one can complain. Plaintiff does not here question that phase of the decision and the defendant cannot rely upon that part of it as a means of rejecting the findings and decision on the other questions of fact.

About two weeks after plaintiff started work on November 25, 1936, its president, who had prepared the bid, went to the site of the work and found that the Government engineer or inspector in marking or blazing the limits of the areas to be cleared to elevation 260 was including within the limits of the clearing which would be required under the contract areas beyond the limits as shown on the contract drawing, or map. Plaintiff had not reached those areas at that time, and apparently did not reach them until long afterwards. Plaintiff's president in making the bid of $51.85 an acre, after the inspection made by him, relied upon the contract map as indicating the extent of the areas to be cleared and as including in the shaded portion all tributary streams, etc., of the eleven sections involved, as set forth in para. 1-02 of the specifications, which were below elevation 260 feet, and the basis of his claim subsequently made was that since the information furnished on this map did not include all those areas which would be included under the language of para. 1-02 plaintiff had been misled. After investigation and consideration the contracting officer agreed with plaintiff that it had been misled by the map.

The proof shows that after bids had been opened and it was found that plaintiff's bid was very low, and much below the Government's estimate for the work which it intended to require under the specifications, and before plaintiff's bid had been accepted, plaintiff's president went to see Colonel Park, the contracting officer, and Colonel Park asked plaintiff's president if he had made a mistake in the bid. This conference was held for the purpose of permitting plaintiff to correct its bid before acceptance, if it should find that it had made a mistake. This, of course, was the fair thing for

the Government to do. At that conference, as the evidence shows, plaintiff's president again read and considered both the specifications and the contract drawing or map in connection with the specifications, and again came to the same conclusion that he had when he made the bid after considering the documents and visiting the site of the work, namely, that the specifications and the map were consistent and that the extent or limits of the areas to be cleared, including tributary streams, etc., of the streams shown on the map and mentioned in para. 1-02 of the specifications, between elevation 244 ft. and 260 ft., were as indicated on the shaded portion of the map. By that interpretation of the map, if it was a reasonable one, as the contracting officer subsequently held, plaintiff was again misled. Plaintiff's president was an engineer of experience. Nothing was said and no discussion was had at that time between plaintiff and Colonel Park as to the proper interpretation of the information disclosed by the specifications and the map, or whether they were consistent, and obviously such a discussion would not have been proper at that time and obviously, also, neither considered it necessary. After again examining and considering the specifications and the map plaintiff's president told the contracting officer that he did not consider that he had made a mistake in the bid of $51.85 an acre. Plaintiff's bid was thereafter in due course accepted and the contract was subsequently executed. Plaintiff subsequently found that the information which it had believed was conveyed by the map was not consistent with the language of para. 1-02 of the specifications. The specifications of course governed and this, of necessity, gave rise to the question whether plaintiff had been misled and, if so, whether it had been reasonably misled. Why was a drawing or map which contained positive statements, and which was known by the Government to be erroneous and incorrect as to the area which it intended should be cleared, made a part of the contract without any warning or statement of its incorrectness, or warning that it should not be relied upon in any way? Why did para. 1-03 of the specifications, entitled "MAPS," contain the positive statement that "The extent of the area to be cleared is shown on map marked * * *,

which forms a part of these specifications * * *," if it was intended by the Government that no reliance should be placed upon such statement and the map referred to? Colonel Park considered all these matters and decided that plaintiff had been reasonably misled, and that is the same question of fact upon which this court must act and upon which the decision must turn.

After defendant's engineer told plaintiff that it would be required to clear all areas below elevation 260, plaintiff observed that two areas of 200 and 400 acres, which were outside the limits of the shaded areas shown on the contract drawing, had been included in the area to be cleared and immediately went to see the contracting officer, Colonel Park, early in September, 1937, and laid before him a protest that it had been misled with reference to the areas which it had been instructed would have to be cleared under the contract which lay outside or beyond the shaded areas shown on the contract map upon which plaintiff had relied in making its bid of $51.85 an acre. In that conference plaintiff pointed out to Colonel Park the areas indicated on the map and explained to him the manner in which it had made up its bid, the reasons which entered into the amount therefor, and also as to why the clearing of such areas would be more expensive than the others. After discussion Colonel Park told plaintiff to make its claim and that he would consider it. Plaintiff first made its claim on which this suit is based on September 27, 1937 (finding 13). After some correspondence plaintiff sent to the contracting officer its combined claims on November 1, 1937, as set forth in finding 14. This claim was in more detail than the claim first filed, but the adjustment in price asked for in Claim 1, to wit, an increase of $26.15 an acre, was the same. The claim of November 1, 1937, itemizing the number of acres in the various sections, as to which plaintiff claimed it had been misled, totaled 1,446 acres. The record shows that plaintiff had several conferences with the contracting officer. The evidence shows, as found in finding 9, that the actual cost of clearing this acreage was $78 an acre and that this was reasonable for the work. It was more expensive to clear the 1,446 acres in question than it was the other areas

required by the contract for the reason that the timber was thicker and heavier, the ground was rough and inaccessible, and it was difficult to get machinery into the areas with which to do the work. The number of acres as to which plaintiff claimed it had been misled was ascertainable after defendant's engineer had marked the limits and before these areas were cleared.

The fact that the contracting officer sent his findings and decision on the questions of fact presented by plaintiff's Claim 1, made the basis of this suit, to the Chief of Engineers direct through the Division Engineer and did not also send it to plaintiff is, in the circumstances, immaterial. Plaintiff was entitled to a decision by the contracting officer under the contract; that decision was made, and the fact that plaintiff did not get it until later cannot be used against it. The findings and decision of the contracting officer were made in the fulfillment of the duty imposed upon and required of him under the contract and may not, therefore, be treated merely as an interdepartmental communication as that term has heretofore been referred to in certain decisions of this court. Moreover, section 695, title 28, U. S. C., provides that "In any court of the United States * * * any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, * * * may be shown to affect its weight, but they shall not affect its admissibility."

The contracting officer's decision is not weakened by the fact that it was not sent to plaintiff at the time it was transmitted to the Chief of Engineers through the Division Engineer. This was the regular practice under the regulations, where final payment had been made. The sixteenth and final payment on the contract, independent of plaintiff's claim, had been made on a voucher dated January 18, 1938,

and paid January 22, 1938. This final voucher was signed by plaintiff under written protest. Whether he sent his decision to the Chief of Engineers for this or other reasons does not matter, for administrative procedure cannot override or control the provisions of the contract as to the effect or finality of a decision made by a contracting officer in favor of the contractor upon a claim whether such decision is made before or after final payment. Plaintiff finally got the findings and decision of the contracting officer, which document is properly in evidence, and relies upon the decision in this case as the basis of its claim for judgment in the amount of $37,812.90 found to be due by the contracting officer.

The decision of the contracting officer in favor of plaintiff on the facts was made final and conclusive without review by any one, and neither the Chief of Engineers nor the Comptroller General had authority to review or reverse it. The letter of the Chief Engineer transmitting plaintiff's claim and the contracting officer's findings and decision to the Comptroller General is therefore immaterial and of no legal effect. Art. 15 of the contract providing that "All disputes concerning questions of fact arising under this contract shall be decided by the contracting officer" made his decision final and conclusive on the parties to the contract, subject *only* to appeal by the contractor. The Government agreed by this provision to be bound by the decision of the contracting officer, if in favor of the contractor, and was given no right of appeal to the head of the department; therefore, it was the duty of the Chief of Engineers and the Comptroller General to pay the amount found to be due by the contracting officer unless they desired to submit the matter to the head of the department on a charge of error so gross as to imply bad faith.

It seems clear that neither plaintiff nor the contracting officer considered the claim as being one for work outside the requirements of the contract within the meaning of para. 1-11 of the specifications. In this I think they were clearly right. But if it be assumed that it was such a claim, it was necessarily implied in para. 1-11 that the contracting officer could under proper circumstances extend the time for filing a claim or waive defective compliance with this provision,

and it seems clear enough that his conduct and action in this regard were in fact an extension of time, or waiver. The circumstances justified such action on his part. Moreover, it appears from the evidence that plaintiff with reasonable promptness filed its claim after its conference with and protest to the contracting officer, as hereinbefore set forth. The claim was filed long before the work was completed, two months and nine days to be exact, and obviously before much, if any, clearing in the areas as to which plaintiff claimed it had been misled was performed. Plaintiff used as many as one thousand men on this job after the work got well under way until it was completed. The contracting officer gave plaintiff an extension of time of forty-nine days because of his decision that it had been misled, and that action was not questioned by the Government, although plaintiff was charged and paid liquidated damages for seventy-three days' delay in completion due to bad weather which was determined by the contractor not to have been unusual.

Colonel Park acted honestly and in good faith upon and with full knowledge of all the facts which we have before us. He was on the ground and was in a better position than anyone else to judge what the true facts were and what effect they reasonably had on plaintiff when it made its bid, and he evidently had had a great deal to do with the preparation of the contract and related documents. Since the map was not correct, which the Government knew and which is admitted, it would have been an easy matter for the Government to have so stated, and it was its duty in fairness to bidders to do this or to give them some sort of warning not to rely on the map, or para. 1-03 of the specifications. Instead of doing this the Government made the positive statement in the specifications that the extent of the area to be cleared was shown on the map. The Government ought to bear the consequences of these misleading representations and should be required to pay the actual excess cost of $37,812.90 occasioned thereby. I do not think Colonel Park's decision was erroneous. However, I do not go into that matter for the reason that if it be assumed that the decision was erroneous it is clear to me that a claim that it was so grossly erroneous as to imply bad faith could not be

sustained. The Government does not claim implied bad faith.

Plaintiff claims the amount of $37,812.90 allowed by the contracting officer, which is admitted to have been the actual reasonable excess cost over the bid price of $51.85 for clearing the 1,446 acres involved, which amount plaintiff would have been paid and would have received from the Government had officials, who had no authority to decide, not reversed the decision of the contracting officer. Since the Government agreed to be bound by Colonel Park's findings and decision on the questions of fact, plaintiff should be given judgment for $37,812.90.

JONES, *Judge*, took no part in the decision of this case.

BERG SHIPBUILDING COMPANY, A CORPORATION, AND GEO. NELSON, SURETY FOR THE BERG SHIPBUILDING COMPANY,

v.

THE UNITED STATES

[No. 45256. Decided January 8, 1945. Plaintiff's motion for new trial overruled April 2, 1945]*

On the Proofs

Government contract; corporation dissolved under State statute for failure to pay license fees has no capacity to sue.—Where the plaintiff, Berg Shipbuilding Company, a corporation which had been incorporated in 1930 under the laws of the State of Washington, became delinquent in the payment of its annual license fees and was automatically dissolved on July 1, 1938, for failure to remit its annual license fees for 3 years, pursuant to Chapter 10, Laws of 1937, State of Washington; and where it is shown that the corporation has not been reinstated in accordance with the Washington State statute; it is *held* that the petition in the instant case must be dismissed as to the Berg Shipbuilding Company because it has no corporate capacity to maintain a suit.

Same; no legal basis for suit by one who was not party to contract.—Where the plaintiff, Nelson, had only some profit-sharing interest in the contract and had made a written agreement to save the

* Plaintiff's petition for writ of certiorari denied.

surety company harmless from its performance bond; and where litigation ensued between Nelson and the surety company, resulting in a judgment against Nelson in favor of the surety company, which apparently was not paid; it is *held* that Nelson was not a party to the contract, which was signed by the Berg Company, and Nelson has no legal basis for suit.

Same; no equitable right to recover.—It is further held that the plaintiff, Nelson, so far as is established by the proof, had no beneficial interest in the contract which would entitle him, in equity, to money recovered, if any, in the instant suit.

Same; plaintiffs not entitled to recover on merits even if capable of suing.—Where it is found that the Government did not, by any breach of duty on its part, cause damaging delay in the completion of the contract, and did not assess more liquidated damages than it was properly entitled to assess, under the contract; it is *held* that the plaintiffs, apart from any question of their capacity to sue, could not recover on the merits.

The Reporter's statement of the case:

No appearance for the plaintiffs. *Mr. George Nelson* was on the brief.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The corporate records of the office of Secretary of State of the State of Washington show that the plaintiff Berg Shipbuilding Company, filed a copy of its articles of incorporation there on January 3, 1930; that the incorporators were Andrew B. Berg, H. A. Schurman and Oscar Pripp; that the principal place of business was located in Seattle, Washington, and that on July 1, 1935, the corporation became delinquent in the payment of its annual license fees and was automatically dissolved on July 1, 1938, for failure to remit its annual license fees for three years, pursuant to Chapter 70, Laws of 1937 of the State of Washington.

2. In January 1933, the defendant through the Department of Commerce, Bureau of Lighthouses, let a contract to the plaintiff Berg Shipbuilding Company, Seattle, Washington, to construct the steel Lighthouse Tender *Hemlock* for the price of $228,480.60. By telegram and letter on January 30, 1933, the Berg Shipbuilding Company was advised that the contract had been approved and that the 275 days' time

period therein contained would begin to run 10 days from that date, thus necessitating the completion of the work by November 11, 1933. Because of changes and extras, 20 days' additional time was allowed, i. e., to December 1, 1933. The work was to be done at Seattle, Washington, and in strict accordance with the specifications, schedules, and drawings which were made a part of the contract, all of which. including the contract, are in evidence as the defendant's exhibits 5 and 6 and are made a part of this finding by reference.

3. The Berg Shipbuilding Company furnished a standard form performance bond, with the United States Fidelity & Guaranty Company as surety, in the sum of $228,480.60. To secure the surety against loss on this bond the Berg Shipbuilding Company executed an agreement to save it harmless, assigning to it all of the right, title and interest of the Berg Shipbuilding Company in its plant and equipment and materials purchased for the performance of the contract, and subrogating the United States Fidelity & Guaranty Company to all its rights under the contract. George Nelson, a financial backer of the Berg Shipbuilding Company, who had an agreement with it to receive a part of the profits expected to be received from the contract, also executed this agreement with the United States Fidelity & Guaranty Company. The performance bond and agreement are in evidence, as the defendant's exhibits 5 and 2, and are made a part of this finding by reference.

4. The Berg Shipbuilding Company constructed the vessel and some extras, and delivered the vessel on July 27, 1934, the total contract price and extras amounting to $242,260.48. As already shown, the contract time for completion as extended was December 1, 1933. Plaintiffs did not complete the vessel until 238 days later, July 27, 1934. By reason of this delay, plaintiffs were assessed liquidated damages in the amount of $47,600 which represents $200 per day for 238 days.

On October 16, 1934, plaintiffs made a claim to the contracting officer for the remission of these liquidated damages. This claim was considered by the contracting officer, who on November 2, 1934, wrote a letter to plaintiffs

denying the claim and giving his reasons therefor. This letter is plaintiffs' exhibit 4 and is made a part of this finding by reference. There was no appeal from this decision of the contracting officer. Later, the claim was submitted to the Comptroller General who remitted $9,600 of the liquidated damages on the ground that 48 days of the delay "were caused by acts of the Government and were excusable under Article 9 of the contract." Accordingly, plaintiff, the Berg Shipbuilding Company, was paid and received on account of its contract, including all changes and extras, the net sum of $204,260.48, and $38,000 was withheld from it as liquidated damages.

5. The Berg Shipbuilding Company was unable to finance the construction of the vessel, and the United States Fidelity & Guaranty Company paid $174,792.12 of the cost and, after receiving reimbursement in the amount of $39,867.05 from either the Berg Company or Nelson, took from Nelson a written agreement that he would pay the balance with interest, and, as security, an assignment of the stock in the Berg Shipbuilding Company, which he had by that time acquired, and other property, and a life insurance policy. This written agreement, dated February 19, 1935, also provided as follows:

> 6. It is agreed that there has heretofore been assigned to the Company all of the right, title and interest of the Berg Shipbuilding Company in and to certain claims of said Company against the United States Government by reason of the construction of said Lighthouse Tender "Hemlock". The principal amounts of said claims are in the total sum of $83,862.13. The Company agrees that any amounts received by it by reason of said claims or by reason of any other claims hereafter asserted against the United States Government or any person shall be credited on the above indebtedness.
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> * * * * *
>
> 8. The Company agrees to fully cooperate with Nelson and with the Berg Shipbuilding Company in the prosecution and collection of any and all claims that said Berg Shipbuilding Company may have against the United States Government, and further agrees to cooperate with Nelson in the prosecution and collection of any claim that Nelson may have against Andrew B. Berg.

The claim of $83,862.13, mentioned in the agreement, was made up of $47,600 of liquidated damages for delay in the completion of the contract, all of which at that time it appeared that the Government would retain but of which, as shown in finding 4, the Comptroller General later released and paid $9,600, and $22,909.28 and $13,352.85, respectively, of increased costs of labor and materials claimed to have been the result of the enactment of the National Industrial Recovery Act. These two latter claims are not asserted or involved in this suit.

6. The United States Fidelity & Guaranty Company foreclosed on the security which it took from Nelson and also took a judgment against him, the exact amount of which does not appear. There is no satisfactory evidence that the judgment has been satisfied or that the United States Fidelity & Guaranty Company would not be entitled to the benefit of any recovery that the Berg Shipbuilding Company or Mr. Nelson might make in this case of money retained by the Government as liquidated damages.

7. In January 1933, when the contract here sued on was entered into, Andrew B. Berg was president and H. A. Schurman was secretary of the Berg Shipbuilding Company. Berg and Oscar Pripp were the principal stockholders, and George Nelson's interest at that time was, as shown in finding 3, that he had agreed to indemnify and save harmless the United States Fidelity & Guaranty Company, the surety on the performance bond, and was to receive a part of the profits to be derived from the performance of the contract. He also expected to advance some money to the Berg Shipbuilding Company. However, he was at that time neither an officer nor a stockholder.

8. When the work was started Berg gave the instructions and was in active charge of the men. He was experienced in the construction of wooden vessels but had had no experience in the construction of steel vessels. The yard of the Berg Shipbuilding Company was not equipped to fabricate or manufacture the chief parts of the vessel. It was only an "assembly" yard, and barely complete at that, and 18 or more contracts were let to subcontractors to fabricate and furnish the various parts that were to comprise

the vessel. Willis G. Telfer, who had had experience in the construction of steel vessels, was employed as the chief superintendent under Berg, but soon after the work started disagreements and arguments took place between Berg and Telfer, Berg and other officers, foremen and employees of the Berg Shipbuilding Company, and between Berg and Lieutenant Fowler, the Government's inspector on the job. These arguments between Berg and Lieutenant Fowler resulted from Berg's unwillingness to construct the vessel in strict accordance with the specifications.

9. In the late fall of 1933, Berg resigned as president of the Berg Shipbuilding Company and left the job, and a little later Schurman resigned as secretary. In February 1934, George Nelson acquired stock of the Berg Shipbuilding Company and became its president; Oscar Pripp became vice president, and E. Bauman became secretary. Nelson, although a successful general contractor, had had no experience in the construction of vessels. The work continued to drag and the vessel was, as shown in finding 4, not completed until July 27, 1934.

10. The principal causes of whatever loss was sustained by the Berg Shipbuilding Company and of its failure to complete the vessel within the contract time as extended were:

(a) The contract price was too low;

(b) The contract period, which was fixed by the Berg Shipbuilding Company in its bid, was too short. Plaintiffs' exhibit 9 which shows the number of days in which each of the seven bidders offered to contract to complete the vessel, is made a part of this finding by reference;

(c) The Berg Shipbuilding Company lacked previous experience in the construction of steel vessels, and did not have an experienced and smooth-working organization of employees;

(d) The method of subletting the fabrication and manufacture of practically all the parts of the vessel and merely "assembling" them in the yard of the Berg Shipbuilding Company was not an economical or expeditious method of construction; there were delays in the ordering of parts and materials; and several of the subcontractors were late in furnishing parts;

(e) Friction and differences between Berg and the superintendent and foremen of construction in the employ of the Berg Shipbuilding Company, and friction and differences between Berg and Lieutenant Fowler, the Government's inspector on the job, growing out of Berg's unwillingness to construct the vessel in strict accordance with the specifications, caused delay and increased costs.

11. Section 7 of the specifications provides:

> *Superintendent of Construction.*—The bureau will authorize a representative, designated a superintendent of construction, to inspect the vessel during the progress of its construction. The work shall be open at all times to the superintendent, and every facility and assistance shall be extended to him in the prosecution of his duties. He will approve or reject the materials and workmanship in detail or upon completion, as they may be satisfactory or may fail to meet with the requirements of the specifications. He will decide questions relative to the intent of the plans and specifications subject to the bureau's approval as to important matters, and advise with the contractor as to the preparation of working plans, lists, and schedules. He will transmit plans and all correspondence from the contractors to the bureau. If the decisions of the superintendent are questioned by the contractors, the matter in dispute shall be referred in writing to the Commissioner of Lighthouses, through the superintendent, and the commissioner's decision shall be final.

No decision of the superintendent of construction was ever referred in writing to the Commissioner of Lighthouses as above provided.

Article 3 of the contract provides:

> *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the depart-

ment or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 5 of the contract provides:

Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Section 4 of the specifications provides:

Changes.—Changes from the requirements of the specifications and plans after the award and acceptance of the contract shall be made only upon the written directions of the Commissioner of Lighthouses.

Changes may be proposed by the bureau or the contractor, in writing, and shall be accompanied by drawings, calculations, etc., as may be necessary for their full understanding. Changes required by the bureau in the arrangements or details of the hull, machinery, joiner, or other work, wherein the general style and character of the vessel are maintained, shall be made by the contractor without extra compensation. Changes involving differences in cost shall be done only after consideration as to the amount and an agreement in writing relative thereto.

The contractor shall be responsible for all departures from these plans and specifications without proper authority, and the bureau may at any time direct the removal and reconstruction of such changes, together with all parts affected thereby, by and at the expense of the contractor.

Except for the change orders of May 18, June 28, and October 19, 1933, and for which the contractor has been paid in full, no changes or extras were ever ordered or authorized by the contracting officer; neither did any of the plaintiffs make any claim for adjustment within the period prescribed by Article 3 of the contract.

12. On September 13, 1933, the Deputy Commissioner of Lighthouses wrote the Berg Shipbuilding Company as follows:

> Referring to the progress of work on the construction of the tender *Hemlock:*
>
> The reports of progress received indicate that the degree of completion of the vessel on September 1st was 45%. The tender is due for completion on November 11, 1933, and has not yet been launched.
>
> The progress curve, based on the present rate of progress indicates that the vessel will not be completed and ready for delivery until about the first part of February 1934.
>
> Your attention is invited to the necessity for expediting the work with all possible speed in order that early delivery of the vessel may be accomplished as liquidated damages stipulated in your contract will be assessed. The Bureau will be pleased to receive a statement from you giving the approximate date you expect to make delivery of the vessel and what action you will take toward pushing the work to completion.

On September 23, 1933, Andrew B. Berg, President of the Berg Shipbuilding Company, wrote the Commissioner of Lighthouses as follows:

> Your letter of September 13th referring to progress of work on the construction of the tender *Hemlock;* when this contract was signed we were fully familiar with the working hours as bid by you to be 30 hours a week, but we were not familiar with the consequences of working a 6-hour day instead of 8.
>
> We made calculations as to a loss of 5 to 10%, but we did not anticipate that men would not adjust themselves to the 6-hour day, and as yet we have not found any of the many men that we have tried that will completely adjust themselves to the 6-hour day. The reason for this is that 6 hours will not warrant a stop at the end of 3 hours for lunch and a rest period, and this would lengthen the hours to the foremen to such extent that they will not stand for it. The 6-hour day has brought about irregular terms of administering the construction in that we cannot find any foremen that will work hand to hand and split this shift.
>
> Our calculation of efficiency of labor to this ship is from 25 to 30% loss compared to the 8-hour shifts. Although we have the hope that after a true study this

can in time be overcome, at present this situation has slowed up the work to a similar percentage as can readily be shown through the progress schedule. We are working at present 100 men in our yard, and we know for sure that with the 8-hour day with full daylight from morning to evening we could have done the same work with around 60 men working a regular crew and the ship would now have been about to close. If the ship is not completed in time, it is due to the 6-hour day enforcement alone.

We are trying to make the best of it with as many men as we can place on the job and expect to make delivery in December.

On February 7, 1934, the Acting Commissioner of Lighthouses wrote the Berg Shipbuilding Company as follows:

> The reports of progress of work on the Tender *Hemlock* indicate that the vessel now past due for delivery was but 80-percent completed on February 1, and that progress during the month of January was only 7 percent.
>
> It appears that the work should be expedited with all possible speed toward early completion, as liquidated damages at the rate of $200 per day will accrue until the vessel is completed in accordance with the provisions of the contract.
>
> The Bureau requests a statement giving the probable date of completion and what efforts are being made to push the work.

On February 16, 1934, the contractor sent a telegram to the Commissioner of Lighthouses which reads as follows:

> Referring to your letter seventh re *Hemlock* we extremely anxious to expedite completion and delivery at earliest possible date request that Superintendent of Construction Fowler be permitted to take full charge of yard and direction of our crews as this will obviate further difficulties and delays by having a competent executive in charge please wire reply.

On February 16, 1934, Putnam, the Commissioner of Lighthouses, sent a telegram to T. P. Fowler, Superintendent of Construction, in care of Berg Shipbuilding Company, Seattle, Washington, which reads as follows:

> Advise Berg reference their telegram February fifteenth Bureau is unable to assign Superintendent Fow-

ler take charge their yard refer article eight *Hemlock* contract.

On April 9, 1934, the Deputy Commissioner of Lighthouses wrote a letter to the Berg Shipbuilding Company which reads as follows:

> Referring to the progress of construction on the tender *Hemlock:*
> It is noted from the progress report, that the work advanced only about 5.13% during the month of March. The vessel is urgently needed and you are requested to advise the Bureau if the work can be advanced more rapidly by placing two shifts of men on this contract. Attention is also invited to the matter of liquidated damages which are accruing at the rate of $200 per day.

13. The proof does not sustain plaintiffs' contention that Lieutenant Fowler, the Government's inspector on the job, took over the construction of the vessel, ousted the officers of the Berg Shipbuilding Company, ran the Berg Shipbuilding Company to suit himself and constructed the vessel in a manner more costly and difficult than called for by the specifications. Neither does the proof sustain plaintiffs' contention that the total of 68 days' additional time ultimately allowed plaintiffs by the Government was not as much as they were entitled to under the contract; nor is any other item of the plaintiffs' claim proved by the evidence.

The court decided, as a conclusion of law, that the plaintiff, the Berg Shipbuilding Company, having been legally dissolved as a corporation, had no capacity to bring suit; and that the plaintiff, Nelson, not being a party to the contract nor having any beneficial interest therein, was not entitled either in law nor in equity, to recover; and the court further decided that on the merits the plaintiffs would not be entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The Berg Shipbuilding Company, a corporation, and Geo. Nelson, Surety for the Berg Company, are the plaintiffs.

The Berg Company in 1933 made a contract to build *The Hemlock*, a steel lighthouse tender, for the Government. The tender was not completed until long after the date stipulated in the contract, as modified by change orders, and the Government, in paying the Berg Company, assessed and withheld liquidated damages, at the rate of $200 per day provided in the contract, amounting to $38,000.

The plaintiffs assert in this suit that the withholding of $38,000 of the contract price was a breach of contract by the Government, since it had, itself, caused the delay in completion; and that the acts which caused the delay, and other acts of the Government, caused the plaintiffs to incur excess costs in the construction of the vessel, and to lose their shipbuilding yard.

The Government asserts at the outset that the Berg Company, a former corporation chartered by the State of Washington, was automatically dissolved, on July 1, 1938, under the laws of that state, for failure to pay its annual license fees. The relevant Washington statutes are in Remington's Revised Statutes of Washington, Sections 3836–4, 10, 12, 13, 14 and 15. Section 3836–14 is, in part, as follows:

> § 3836–14. *Dissolution for non-payment.—Noting on record—Reinstatement on payment.*—In the event that any corporation shall allow license fees due the state under existing laws or by virtue of this chapter, to become delinquent for a period of three consecutive years and the secretary of state shall be unable to collect said fees in full, it shall be his duty to enter upon his records a notation that such corporation is dissolved and said corporation shall thereupon be dissolved and the secretary of state shall thereupon be free to grant the name of the corporation so dissolved to any other corporation thereafter organized: * * *.[1]
>
> Upon reinstatement as herein provided it shall be the duty of the secretary of state to enter upon his records a notation that such corporation is reinstated, and it shall thereupon be reinstated as of the date on which its name was stricken from or noted as dissolved upon the rec-

[1] The omitted portions relate to reinstatement by paying the fees for which the corporation is delinquent.

> ords of the office of the secretary of state, and such corporation shall have the right to sue and shall enjoy the same rights and powers as if its name had never been stricken from the records or it had never been dissolved and all things done by it in the exercise of its corporate powers before such reinstatement shall become valid acts of the corporation.

The statute seems to be plain. We should not permit the policy of the State of Washington to be frustrated by permitting a former corporation, created by that state, to function as if it were in good standing when, by the law under which it was created, it had been automatically dissolved. The express provision, in the latter part of the section, that a dissolved corporation may, *upon reinstatement*, have the same right to sue as if it had not been dissolved seems to make it plain that it does not have the right to sue after it is dissolved and before it is reinstated. See *Follett* v. *Clark*, 19 Wash. 2d 518; 143 P. (2d), 536, 537; Cf. *Holpuch Case*, No. 43813, decided this day [102 C. Cls. 795].

The petition must be dismissed as to the Berg Shipbuilding Company because it has no corporate capacity to maintain a suit.

The Government also contends that the plaintiff Nelson may not maintain this suit because the Government is under no obligation to him, contractual or otherwise. Nelson was not a party to the contract, which was signed by the Berg Company. As shown in findings 3, 5, and 6, the United States Fidelity and Guaranty Company signed the performance bond, guaranteeing performance by the Berg Company, and the Berg Company and Nelson, who had some profit-sharing interest in the contract, made a written agreement to save the Fidelity Company harmless from liability on its bond, the Berg Company assigning to it all of its assets, and its rights against the United States under the contract. The Fidelity Company had to pay $174,792.12 to get the contract completed. It was repaid $39,867.05 of this, whether by the Berg Company or by Nelson does not appear. It took a further agreement from Nelson, to pay it

the balance, with interest, and a mortgage on the Berg stock, which Nelson had by that time acquired, and other property. It sued Nelson, foreclosed on the security, and took a judgment against him for an amount which the evidence does not show. So far as is proved, the judgment has not been paid.

In these circumstances Nelson has no basis for suit. He made no contract with the Government. If, disregarding the contractual relation, we seek for some beneficial interest in Nelson which would entitle him, in equity, to money recovered in this suit, we find no such interest. The Fidelity Company would seem to be entitled, in equity, to any amount recovered, unless the amount was so large as to more than reimburse it. In that case the excess would, so far as is proved, belong to the trustees or liquidators of the Berg Shipbuilding Company. So the petition must be dismissed, as to the plaintiff Nelson, for lack of proof of his interest in the subject matter of the suit.

Because no professional counsel has appeared for the plaintiffs, we have, in spite of our conclusions stated above, considered the merits of the case. We have found, on the merits, that the Government did not, by any breach of duty on its part, cause damaging delay in the building of this ship, and did not assess more liquidated damages than it was properly entitled to assess, under the contract. Our conclusions in these regards are stated in our findings 10 and 13 and will not be repeated here. They show that, in our opinion, the plaintiffs, apart from any question of their capacity to sue, could not recover on the merits.

The petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

RICHARD CHARLES HAYES v. THE UNITED STATES

[No. 45672. Decided January 8, 1945. Plaintiff's motion for new trial overruled April 2, 1945]

On the Proofs

Government contract; agreement to purchase S. S. Medric; rescission on ground of fraudulent misrepresentation.—Where plaintiff entered into an agreement with the Government to sell to the Government the *S. S. Medric* at an agreed price; and where, upon delivery of the vessel, defendant refused to accept and pay for the vessel on the ground that there had been misrepresentations of material facts as to the condition of the vessel amounting to fraud; and where it is shown by the evidence that plaintiff did make fraudulent representations concerning the vessel which were properly relied upon by defendant's representative; it is *held* that the defendant was justified in rescinding the agreement as to the price and in refusing to accept the vessel and to execute the written contract, and plaintiff is not entitled to recover. (*Taylor* v. *Burr Printing Co.*, 26 Fed. (2d) 331; *Keeler* v. *Fred T. Ley & Co., Inc.*, 49 Fed. (2d) 872.)

Same; Government not liable for negligence, malfeasance or omission of duty of its agents as to reports on vessel's condition.—Where, in view of the actual condition of the vessel at the time it was tendered for acceptance, as established by the proof, it is evident that the inspections by Government agents, as to which reports were submitted, were negligently or carelessly made, or reported; it is *held* that the Government cannot be held liable for the negligence, malfeasance or omission of duty of its agents.

Same; Government justified in relying upon plaintiff's representations as to repairs and replacements.—The Government was justified in relying upon representations by the plaintiff as to the annual expenditures for repairs and replacements, and other values, which were accepted as statements of fact by one in position to know, and not as an opinion.

Same; plaintiff's representations false and untrue.—Instead of being reasonably accurate, it is *held* that representations by the plaintiff as to expenditures for repairs and replacements and other values were false and untrue.

The Reporter's statement of the case:

Mr. James M. Tunnell, Jr., for plaintiff.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff, who held title to the S. S. *Medric* for the use and benefit of the Consolidated Fisheries Co., a corporation, seeks to recover $87,500, representing the price at which it is alleged the *Medric* was sold to, purchased by and delivered to the United States under a contract of sale. In September 1941, prior to delivery of the ship October 21, 1941, a price of $87,500 had been agreed upon as fair and reasonable by the Bureau of Ships, Navy Department, and approved by the chief of that bureau acting under authority of the Secretary of War, which amount has not been paid. The written contract was never executed by the Government.

At the time the vessel was delivered at Philadelphia defendant, upon finding the ship to be in bad condition, refused to accept it and to sign a contract of purchase at any price on the ground that the ship was not in as good condition as plaintiff had represented and led the Government to believe during negotiations as to price. The Government defends this action on the ground that plaintiff, through his agent and authorized representative, had made certain material representations concerning the condition and value of the ship which were untrue and so false as to amount to fraud, and upon which representations the authorized agents of the Government placed material and substantial reliance in concluding for the purpose of negotiating a contract of purchase under section 2 (a) of the National Defense Act of June 28, 1940 that a price of $87,500 was fair and reasonable.

Defendant makes a counterclaim for $6,960.87 for expenses incurred in the care of the ship after defendant refused to accept it and requested plaintiff to remove it.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Section 2 (a) of the National Defense Act, approved June 28, 1940 (54 Stat. 676), provided that whenever deemed

by the President to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, "the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair or alteration of complete naval vessels, * * * with or without advertising or competitive bidding upon determination that the price is fair and reasonable." The Secretary of the Navy was required to report every three months to the Congress the contracts entered into under section 2.

2. The Consolidated Fisheries Company, a Delaware corporation with principal office at Lewes, Delaware, which was the real and beneficial owner of the S. S. *Medric*, hereinafter mentioned, was organized in 1923; this was a family corporation and all its stock was owned by plaintiff, Richard C. Hayes, his wife, a brother Thomas H. Hayes, and two other brothers, and a corporation all the stock of which was owned by the Hayes brothers. Thomas H. Hayes was, since organization of the Consolidated Fisheries Co., and at all times hereinafter mentioned, the general manager of the corporation. Richard C. Hayes and Thomas H. Hayes were both active in the management of the affairs of the corporation; the active management of the affairs of the corporation and upkeep of the ships owned by it were under Thomas H. Hayes. All negotiations with the Government hereinafter mentioned were carried on by Thomas H. Hayes as the duly authorized agent and representative of plaintiff and the Fisheries Company. As hereinafter used, the term "plaintiff" includes both Richard C. Hayes, who held the bare legal title to the S. S. *Medric*, and the Consolidated Fisheries Co., the real and beneficial owner of the ship.

3. In February and October 1940, certain preliminary inspections, the nature, extent, and purpose of which are not disclosed by the record, were made of plaintiff's steamers "*Medric*," "*Pelican*," and "*Sea Bird*" by representatives from the Fourth and Fifth Naval Districts. No reports appear to have been made to the Government.

October 25, 1940, plaintiff initiated negotiations with the Government at Washington for sale of the vessels and on October 26, 1940, plaintiff wrote a letter to Captain C. S.

Alden, President, Joint Merchant Vessel Board, Navy Department, in part as follows:

> I want to thank you kindly for the time you gave me and the courtesy you extended on my visit to your office on yesterday.
>
> As I did not have the particulars covering the inspection of our steamers, *Medric*, *Pelican*, and *Sea Bird* by your department with me, you will, no doubt, recall my saying that the Fifth Naval District had inspected them and that it had been done at the request of those in authority at the Fourth Naval District. While several letters have passed on this subject, we are enclosing herewith copy of a letter from the Fourth Naval District dated February 19, 1940, and copy of letter from the Fifth Naval District on date of October 22. From these, you will note, that the inspection was made and, we understand from our representatives who were present, that the above vessels were found in very good sea-worthy condition and satisfactory for service.
>
> * * * * *
>
> Something I didn't tell you on yesterday was that these vessels were originally built not as Menhaden Fishing Boards but as Trawlers. We purchased and converted them into Menhaden Fishing Steamers and did not change the location of the machinery, that remaining the same as formerly and in about the same location as the machinery in the Trawlers recently purchased in Boston. We made no alterations other than putting on the two forward houses that set upon the deck. The lower one is used as a galley and the upper one as accommodations for captain and officers. This could be easily moved back on the after house and the lower deck house either moved back or eliminated. By this process you could, if desired, make the boats exactly as they were originally built and with a very small outlay.
>
> The vessels are of wood construction but have always been kept in very efficient operating condition. There is no bad or deteriorated wood in them and they are very heavily built and the frames are iron strapped. The planking is either 5″ or 6″ in thickness and the ceiling is the same thickness. The boats have fine machinery, good speed and are ready and capable of going into any service any place desired instantly.
>
> We would like very much to dispose of these three vessels as we desire to build some, as explained to you,

of a smaller type, and if your department could use these, we would make the price very attractive.

Yours very respectfully,

CONSOLIDATED FISHERIES COMPANY,
By: (S) THOMAS H. HAYES.

Thomas H. Hayes had had intimate knowledge of the steamer *Medric* since 1924, at the time she was acquired by plaintiff.

Subsequently, during May and June 1941, representatives of the Navy made certain inspections of the S. S. *Medric* in connection with its possible purchase by the Government. These inspections were cursory ones only, and no full and complete inspection of the *Medric* had been made by the Government prior to the conference, hereinafter mentioned, on September 9, 1941, with reference to a reasonable price for the vessel and the negotiation of a contract for purchase thereof.

The first inspection was made by Lieutenant Commander Direlan May 2, 1941. The second inspection was made by Commander Sullivan May 8, 1941, and the third inspection was made June 19, 1941, by Lieutenant W. A. Vick of the Port Director's Office, Navy Yard, Norfolk, with Mr. C. I. Olsen, Naval Architect. At the first two inspections the vessel was afloat. At the third inspection, which was a hull inspection, the vessel was hauled out of the water for a more complete examination. A portion of two days was spent in connection with this examination, during which certain borings were made in the hull. Only two of the three reports of these inspections to the Navy Department were reduced to writing. They were brief and cursory. There was disagreement among the officers who conducted the inspections as to the suitability of the acquisition of the vessel. The report made by Lieutenant Commander Direlan disclosed that it was to a large extent based upon representations made to him by representatives of the vessel's owner that all the vessels could be put in condition by its own crew within ten days. The report of the inspection conducted by Lieutenant Vick and Mr. Olsen was confined to the condition of the vessel's hull, and indicated nothing as to the condition of the vessel's interior, boilers, etc.

4. Shortly prior to September 9, 1941, the Bureau of Ships, Navy Department, arranged a conference in Washington with Thomas H. Hayes, representing plaintiff and the Consolidated Fisheries Company, for the purpose of negotiating the terms under which one of plaintiff's vessels could be acquired by the Navy, by purchase, for conversion to a salvage vessel. Thomas H. Hayes, general manager, came to this conference as the authorized representative of Richard C. Hayes and the Consolidated Fisheries Company. The conference was held September 9, 1941, with Commander N. L. Rawlings, U. S. Navy, Bureau of Ships, and other officers of that Bureau. There were also present two naval officers representing Commander George F. Yoran, Purchasing Officer, Purchase Division, Bureau of Supplies and Accounts, Navy Department. Commander Yoran, as purchasing officer, had charge of the preparation and the entering into of written contracts for acquisition of vessels. Commander Rawlings had been assigned to the Bureau of Ships since the fall of 1939 and, at all times herein material, was assistant head of the Shipbuilding Division of that Bureau. A part of his duties in that capacity consisted of negotiating contracts for acquisition and the conversion of vessels. Admiral C. A. Jones was the head of the Shipbuilding Division and was the immediate superior of Commander Rawlings.

5. As a result of the information furnished by plaintiff at the above-mentioned conference and that contained in plaintiff's letter of October 26, 1940, and the reports hereinbefore mentioned of the inspections in May and June 1941 which Commander Rawlings had, Rawlings, upon the basis of plaintiff's representations and what information he had in the reports of inspections in May and June, 1941, offered plaintiff $75,000 for one of its vessels after Thomas H. Hayes had asked $125,000. Rawlings finally offered $87,500 and that offer was accepted by Mr. Hayes.

In arriving at a decision to acquire one of plaintiff's vessels and in making this offer of $87,500 as a fair and reasonable price for the S. S. *Medric*, Commander Rawlings, as the authorized officer of the United States acting under the National Defense Act of June 28, 1940, placed material and

substantial reliance upon the facts, figures, and information furnished by Thomas H. Hayes on behalf of plaintiff in a letter of October 26, 1940, and at the conference of September 9, 1941. Commander Rawlings accepted the figures given by Hayes at the September 9, 1941, conference as to cost, repairs, renewals, replacements, etc., as being fairly correct and fairly approximate, although not perhaps exact. He assumed that they were correct within reason and relied upon them in arriving at his decision as to acquisition and price. The representations, facts, and figures submitted by plaintiff at the September 9, 1941, conference above referred to can best be stated in the exact words of Commander Rawlings and Thomas H. Hayes as disclosed by the stenographic record made thereof at the time, and which statements, so far as material, were as follows:

RAWLINGS. Mr. Hayes, we have asked you to come here this morning in connection with the possible acquisition by the Navy of one of three vessels which we understand you own, or for which you represent the owner, for conversion to a salvage vessel for the Navy Department's use in the National Defense program. * * *.

What is your position in that corporation?

HAYES. My position is that of a sort of general manager.

RAWLINGS. Have you been with that corporation for a period of years?

HAYES. Yes, since its organization.

RAWLINGS. Which was about when?

HAYES. 1924.

* * * * *

RAWLINGS. When were the vessels built?

HAYES. They were built in 1919. The three were built about the same time.

RAWLINGS. According to my records, the *Sea Bird* and *Pelican* were built in 1919 and the *Medric* in 1920.

HAYES. That is right.

RAWLINGS. Do you have information as to their original cost?

HAYES. They were built by the East Coast Fisheries Company on time and material at about $600,000 each, I have heard. How true that is, I don't know.

RAWLINGS. You acquired them in 1924 from the original owner. What was the acquisition cost to you?

HAYES. When we bought them, they were what we call trawls and we had to convert them. The acquisition

cost, as I recall it, was $15,000, and we spent $60,000 to convert them to our service.

RAWLINGS. So the total cost was $75,000 each.

HAYES. Yes.

RAWLINGS. Including the conversion features which you put into them. So the hulls were approximately $15,000 each in 1924?

HAYES. Yes.

RAWLINGS. What improvements other than running repairs have been made since the vessel was acquired? Have you renovated the engines, for instance?

HAYES. No. We have renovated the pumps and generators. I would say offhand that the added cost per year has been somewhere between $8,000 and $10,000 per year. There were additions put on.

RAWLINGS. There have been no recent major changes or renewals?

HAYES. Yes. Quite a lot in the way of new timber.

RAWLINGS. I meant in the way of machinery, Mr. Hayes.

HAYES. No.

RAWLINGS. What value do the boats carry now on the books of your company?

HAYES. I couldn't say without looking it up, but it is somewhere around $75,000.

RAWLINGS. What rate of depreciation do you use? Hasn't your depreciation been nil?

HAYES. Yes. We figure that the $8,000 to $10,000 we spend each year just about balances the depreciation.

RAWLINGS. For how much is the vessel insured?

HAYES. We don't carry much insurance. It seems to me it is about $25,000.

* * * * *

RAWLINGS. What would it cost to replace the vessel at the present time?

HAYES. I would think that it would be about $300,000 each. I think that would be a conservative estimate.

RAWLINGS. What type of main propelling machinery have you?

HAYES. Oil burning boilers.

I doubt very much if you could build a new vessel of that class for the money.

* * * * *

RAWLINGS. When was your vessel last on the ways?

HAYES. They were hauled out in June at Norfolk, Virginia—about June 20th—and were inspected by your men at the Navy Yard in Norfolk.

RAWLINGS. If considered necessary, would you be willing to haul out the vessels for bottom inspection?

HAYES. Yes.

RAWLINGS. At your expense?

HAYES. Yes.

RAWLINGS. What equipment, such as radio, silverware, chinaware, bedding, etc., would you remove before delivery, and what reduction in price would you make on that account?

HAYES. Well, I don't believe we would fight about that, because there isn't anything on there of any great value.

RAWLINGS. Is there any leased material on board?

HAYES. No, sir.

RAWLINGS. What spare parts, both on board and on shore, will you deliver with the vessel?

HAYES. Some spare cylinder heads and I think some rods, and some bearings that belong to each one of the three boats.

RAWLINGS. You would be prepared to give us a list of these parts?

HAYES. Yes. A list of what we have on hand.

RAWLINGS. The Navy Department would desire to purchase the vessel as is, with such fuel oil and lubricating oil as may be on board at the time of delivery. This would be agreeable to you?

HAYES. Yes.

* * * * *

RAWLINGS. Do you have inclining experiment data?

HAYES. No.

RAWLINGS. We would want to know what condition we are running into. Would you be willing to have her inclined at your expense?

HAYES. Well, I don't know.

RAWLINGS. The American Bureau of Shipping will do so at a nominal expense.

HAYES. Well, not at my expense.

RAWLINGS. But you would be willing to have the Navy do it?

HAYES. Yes.

RAWLINGS. Have you any plans of the ship at all?

HAYES. No, we had a fire that burned up all the plans.

* * * * *

RAWLINGS. Would you be willing, if we can reach satisfactory terms, to deliver the boat to the Navy Yard, Philadelphia?

HAYES. Yes.

* * * * *

RAWLINGS. Will you make all necessary arrangements with the customs house for the surrender and cancellation of the vessel's documents, the procurement of a certificate of ownership, and the forwarding of the same to the Navy Department, and the recordation of the bill of sale to the Navy Department?

HAYES. Yes.

RAWLINGS. Now, Mr. Hayes, I think the conditions we have indicated to one another are acceptable. The main consideration now is at what price would you offer the several vessels—start with the *Medric*—under the conditions we have agreed to?

HAYES. That is the main issue, isn't it?

RAWLINGS. Yes.

HAYES. $125,000.

RAWLINGS. Is that the best you can offer the vessel at?

HAYES. We have got to replace it. I would say that that price would be a reasonable price. It is a real nice boat.

RAWLINGS. How about the *Pelican?*

HAYES. They are all about the same.

RAWLINGS. Mr. Hayes, I will be equally as frank and say that that is a somewhat higher price than we feel that we should pay. I was prepared to offer you $75,000.

HAYES. Well, you see, after all, Commander, we have got to figure on replacing the boat and we want to be reasonable. We would like to get rid of them on account of their bigness. We don't know whether to hold them or get rid of them.

RAWLINGS. I appreciate that. On the other hand, let's look at it from the Government's point of view. The Government needs the vessel for national defense. You have that interest as well as we. The vessels are approximately 20 years old. You have gotten the use of them over a period of 17 years and gotten back what you paid for them as well as the conversion cost. We will all agree that no wood vessel 20 years old is as good as a new one.

HAYES. These are exceptional vessels. They are built for tough service.

RAWLINGS. All of which makes them that much more suitable for our purpose.

HAYES. We find wooden vessels more suitable for our use. We have never had one minute's trouble with the machinery of the boats. The boilers are about the best there is. We really have got something good. I wouldn't even want to talk about disposing of them

if it were not for that law in Jersey [which prevented use of fishing vessels of this size in its waters]. I really think that price is reasonable for what you are getting. You know there are all kinds of boats. Here are boats in service ready for business and capable of going anywhere.

RAWLINGS. They are very suitable for our purpose, but we still feel that under the circumstances $75,000 would be a fair and reasonable price. We can close on anyone of the three vessels at that price.

HAYES. If you could take the three, it might be a different thing.

RAWLINGS. I don't know what the prospects are of our wanting more than one. We have been directed to purchase, if possible, at a fair and reasonable price, one of the three.

HAYES. Which one do you want?

RAWLINGS. We would like the *Medric.*

HAYES. Why is that?

RAWLINGS. Her age is a little bit less. But we will take any one of the three at $75,000.

HAYES. There is just a month or two difference in the ages.

RAWLINGS. I won't argue. I will let you select the one.

HAYES. There is no difference.

RAWLINGS. Then we will take the *Medric.* Or the *Pelican* or the *Sea Bird.* According to our information, the boats are in better than average condition.

HAYES. Yes, they have been kept up. We go along the coast everywhere, you know, and without a bit of trouble. But that price is really—we have got to have something to replace them. $75,000 won't hardly buy a wheelbarrow these days.

RAWLINGS. I really feel that the price of $75,000 for one of those ships is a fair and reasonable one.

HAYES. No, I can't agree with you. I am anxious to get rid of the boats on account of the [N. J.] law. If I wasn't anxious to get rid of them, I wouldn't talk $125,000 because I know the value of the boats. One thing I do know is a fishing boat. But I tell you what I will do. I will be inclined to say that if you will pay $100,000 for one we will take it. I can't go below that figure. What could I do with $100,000? I couldn't build hardly anything, you know. $100,000 around a shipyard amounts to very little. But I will agree to that. That is the best I can do. Jersey has got this law that you can't fish that size boat in her waters.

We border right on Jersey. This year it hasn't handicapped us because the fish have been outside the three-mile limit.

RAWLINGS. You consider $100,000 to be fair and reasonable?

HAYES. Yes.

RAWLINGS. Suppose we split our two prices, then. Spilt $75,000 and $100,000. I will split with you.

HAYES. That is what I thought I was doing when I made it $100,000 instead of $125,000.

RAWLINGS. I will tell you, Mr. Hayes, I don't believe I can go up to $100,000 without a further check on the boats. According to our information, we believe $75,000 would be a fair price. We might be able to stretch it to $87,500. You must remember we are not talking about a new boat here. It cost you $75,000 17 years ago.

HAYES. Remember the $8,000 or $10,000 a year spent on it, too.

RAWLINGS. There are many ways of keeping them running. I recognize that this boat is above average. There is no doubt about that.

HAYES. They can go anywhere, and in any kind of weather.

RAWLINGS. Can't we agree on $87,500? If you can agree with us on that, we can close the deal.

HAYES. Which boat are you talking about.

RAWLINGS. I am letting you select the boat.

HAYES. All right, we will trade if you want to.

RAWLINGS. I have to get the approval of the Secretary of the Navy. We will immediately undertake to get that approval and notify you as soon as possible with the understanding that delivery will be made not later than the 15th of October at Baltimore.

HAYES. If you want the other two, we will do it at the same price provided you do it before we lay them up.

RAWLINGS. Which boat will it be, then?

HAYES. It doesn't make much difference.

RAWLINGS. The *Medric*, then. We will let you know as soon as we can get this approved and authorized.

The price agreed upon was subject to approval by the Secretary of the Navy, and the negotiation and execution of a formal contract by plaintiff and the Government. Approval by the Secretary of $87,500 recommended was ob-

tained but the contract was never executed by the Government for the reasons hereinafter set forth.

6. The related values and annual expenditures given by plaintiff and relied upon by the Government were grossly misstated and were given with the knowledge that they were being relied upon, and the representations as to the physical condition of the *Medric*, as reported by the owner in the letter to the Government of October 26, 1940 and at the conference of September 9, 1941, with intention that they be relied upon, and which were relied upon by the Government, were misleading and untrue.

Plaintiff knew, or should have known, that the stated values and annual expenditures were not reasonably accurate but that they were being grossly misstated, and plaintiff knew, or should have known, that the representations made in October 1940 and September 1941 as to the condition of the *Medric* were false and untrue.

The representations by plaintiff above mentioned were so false and untrue as to amount to fraud.

7. In June 1941 an assistant hull inspector and an assistant boiler inspector of the Department of Commerce, Bureau of Marine Inspection and Navigation, made annual inspections of the boilers, engines, hull, and equipment of the *Medric*, and also a drydock examination of the underwater body and outboard fittings for the purpose of passing upon plaintiff's application for an annual license or certificate to operate the ship as a fishing vessel for the ensuing year. In the standard report forms, these inspectors reported that the condition of the hull and equipment, boilers, and engines was "good." These inspectors inspected the interior of the vessel. These reports were not before the officials of the Navy Department who carried on or participated in the negotiations with plaintiff in connection with acquisition of the *Medric* for use in the salvage service of the Navy.

8. A subsequent examination made by the Government of plaintiff's books of account covering the operation of the *Medric* after this suit was instituted established that the cost of converting it into a fishing boat for owner's use at the time of original acquisition in 1924 was $49,524.07 and

not $60,000 as represented, which figure of $49,524.07 included allowances received from underwriters for losses from fire during reconversion at the Company's yard. The duty rested with the owners of establishing reasonable and proper reconversion costs less proper amounts to be allocated to fire losses. The additions and betterments charged to the *Medric* as disclosed by the Company's books from 1924 to 1931 were as follows:

Year	Amount	Year	Amount
1924	---------	1933	$1, 322. 75
1925	---------	1934	367. 73
1926	$2, 000. 00	1935	7, 511. 83
1927	---------	1936	6, 749. 75
1928	---------	1937	4, 612. 67
1929	---------	1938	7, 124. 62
1930	---------	1939	1, 079. 61
1931	---------	1940	6, 580. 05
1932	346. 72	1941	---------

The repair expenses charged to the vessel for the years 1924 to 1931 were as follows:

Year	Amount	Year	Amount
1924	---------	1928	$3, 564. 11
1925	$ 435. 33	1929	3, 229. 16
1926	2, 360. 45	1930	980. 29
1927	3, 000. 18	1931	640. 63

Subsequent to 1931 all repair expenses were charged to the assets account as additions and betterments.

While representations were made by plaintiff in September 1941 that these annual expenses were $8,000 to $10,000 a year, they in fact ranged from $346.72 to $7,511.83 a year, an average annual expenditure of $2,883.72. The book value of the *Medric* was not $75,000, as represented by owners, but only $35,069.10.

9. Immediately following the conference with plaintiff on September 9, 1941, the transcribed stenographic record of the conference was signed by Commander Rawlings and submitted to Captain (now rear admiral) Jones, who also approvèd it. An approved copy was thereupon sent to plaintiff, all in accordance with the regular procedure in such cases.

Thereupon the Bureau of Ships prepared a requisition to the Purchase Division, Bureau of Supplies and Accounts

(Commander Geo. F. Yoran, purchasing officer), in part, as follows:

> I certify that it is urgent that contract for the Steamship *Medric* be negotiated as soon as possible, that it is necessary to negotiate it with the particular company named in order to obtain an additional vessel for conversion to a Salvage Vessel (ARS) to meet the present emergency, and that advertising or competitive bidding would not result in effective competition. I further certify that the cost [$87,500] is fair and reasonable.

Other provisions of the requisition set forth the price so determined and contained certain terms and conditions to be included in the contract to be negotiated, and also set forth the following:

> The required Steamship *Medric* is proprietary to Consolidated Fisheries Co., Lewes, Del., and no other will meet the requirements of the Naval service for the following reasons: As the exigencies of the services require immediate performance of this vessel, time does not permit of the delay incident to the advertisement for bids. The abovementioned firm is the only firm prepared to furnish the vessel desired within the time required without displacing or interrupting urgent Government work in hand on prospective orders in connection with the National Defense.

This requisition was approved September 18, 1941, by the Chief of the Bureau of Ships acting under authority of the Secretary of the Navy, and was approved September 20, 1941, by the Paymaster of the Navy.

10. September 10, 1941, Admiral Jones wrote plaintiff that it was desired that the *Medric* be delivered at Philadelphia, for acceptance by the Navy, instead of at Baltimore. September 19, plaintiff agreed to the change of place of delivery.

11. Following approval of the requisition mentioned in finding 9 by the Chief of the Bureau of Ships and the Paymaster General, Commander Geo. F. Yoran, Purchasing Officer, Bureau of Supplies and Accounts, wrote the Consolidated Fisheries Co., on September 23, 1941, as follows:

> **Contract NOs–92184 has been awarded you to cover the Steamship *Medric* at a price of $87,500.00, including all equipment, all spare parts both on board and shore based applicable to the vessel, and all spare parts to be listed**

required by ABS Rules and Lloyd's Rules as the minimum requirements, except items which by mutual agreement between the Navy Department and the owner are considered to be of no naval value. * * *

Formal contract dated 23 September 1941 will be prepared and forwarded for execution within a short time.

October 18, Yoran wrote the Fisheries Co., that the award to the company was made under misinformation since it appeared that Richard C. Hayes was the owner of the vessel.

October 18, 1941, Richard C. Hayes, who held legal title to the *Medric*, was sent the following letter by Yoran:

> SIR: Award is hereby made to you under Contract NOs-92184 covering the Steamship *Medric* at a price of $87,500.00, including all equipment, all spare parts both on board and shore based applicable to the vessel and which are available at time of delivery, except items which by mutual agreement between the Navy Department and the owner are considered to be of no naval value.
>
> The vessel is to be delivered to the Commandant, Fourth Naval District, at Kensington Shipyard and Dry Dock Corporation, Philadelphia, Pennsylvania, within ten days after date of contract.
>
> Formal contract dated 18 October 1941 will be prepared and forwarded for execution in due course.

October 21, 1941, the *Medric* was delivered to the Navy Yard at Philadelphia, the ship being received by Rear Admiral A. E. Watson, then acting as Commandant of the Fourth Naval District, who, on that date, issued to plaintiff's representative the following receipt:

> Received at the Navy Yard, Philadelphia, Pa., of the Consolidated Fisheries Company of Lewes, Delaware, the menhaden fishing boat *Medric* in an "as is" condition.

October 22, 1941, Yoran wrote plaintiff, Richard C. Hayes, the following letter:

> Contract NOs-92184 has been prepared to cover the Steamship *Medric* at a price of $87,500.00, and the original and contractor's copy are forwarded herewith for execution. When properly executed, the original is to be returned to this bureau, the contractor's copy to be retained for your files.
>
> It is requested that the bill of sale for this vessel be written to transfer the title thereto to "The United

States of America". The documents concerned are to be recorded in the Custom House at the port of documentation before delivery with the vessel.

Yoran was acting within his authority in writing and sending the letters.

Appended to the above-quoted letter of October 22 were two unsigned contracts, being designated as "the original" and "contractor's copy", respectively.

12. The contract forwarded by Yoran to plaintiff for execution contained the following clauses:

ARTICLE 1. SCOPE OF THIS CONTRACT. (a) The contractor, subject to the provisions hereinafter set forth, will, in consideration of a payment or payments stipulated herein, sell, transfer, and convey title to the vessel described in Article 2 to the United States and deliver the Ship complete in all respects, "as is," accompanied by clear title, including all equipment, all spare parts both on board and shore based applicable to the vessel and which are available at time of delivery, except items which by mutual agreement between the Navy Department and the owner are considered to be of no naval value.

(b) *Delivery*.—The vessel to be delivered to the Commandant, Fourth Naval District, at Kensington Shipyard and Dry Dock Corporation, Philadelphia, Pennsylvania, within ten days after date of contract.

Article 2. DESCRIPTION OF VESSEL.

S. S. *Medric* (Triple expansion engines):

Gross Tonnage	380
Net Tonnage	189
Length	150′ 4″
Breadth	25′
Depth	13′ 3″
Built	1920
Official Number	219992

ARTICLE 3. BILL OF SALE.—The contractor shall furnish at its expense to the United States a Bill of Sale, conforming to the form approved by the Bureau of Marine Inspection and Navigation of the Department of Commerce in accordance with the usual maritime practice. The bill of sale shall be recorded in the Custom House at the port of documentation and delivered to the Navy Department.

ARTICLE 4. PAYMENT. (a) When all the conditions, covenants, and provisions of the contract shall have been

performed and fulfilled by and on the part of the contractor, it shall be entitled within 10 days after the filing and acceptance of its request therefor to receive payment of eighty-seven thousand five hundred and no/100 dollars ($87,500.00) or so much thereof as it may be entitled to, on the execution of a release of claims against the United States arising under or by virtue of the contract: *Provided, however*, That the Secretary of the Navy may, in his discretion, make partial payments on account.

(b) As payment is made at the contract price stipulated herein, the vessel on account of which payment has been so made shall immediately become the sole property of the United States; but this provision shall not be construed as a waiver of the right of the Government to require a fulfillment of all the terms of the contract.

(c) All warrants for payments under the contract shall be made payable to the contractor.

(d) Vouchers shall be submitted to Disbursing Officer, Navy Yard, Philadelphia, Pa.

(e) Payment will be made by Disbursing Officer, Navy Yard, Philadelphia, Pa.

13. By letter of October 29, 1941, plaintiff returned the original contract, duly executed by himself but not executed on behalf of the Government, to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C. At the same time and in the same communication, plaintiff forwarded to the Bureau a bill of sale, of the form approved by the Bureau of Marine Inspection and Navigation of the Department of Commerce, in accordance with the usual maritime practice, the bill of sale having been recorded on October 29, 1941, in the Custom House at the port of documentation, which, for the S. S. *Medric* was the Port of New York, transferring title in the S. S. *Medric* to the United States of America. At the same time and in the same manner there was forwarded to the Bureau of Supplies and Accounts of the Navy Department a duly executed certificate of ownership in the S. S. *Medric* certifying that the vessel was free and clear of all liens and encumbrances whatsoever.

14. Upon delivery of the *Medric* October 21 at the Philadelphia Navy Yard, it was secured to the dock of the J. H. Mathis Shipbuilding Co., at Camden. Upon delivery Cap-

tain C. M. Hall, district material officer, and C. O. Burton, a senior estimator and planner at the Navy Yard, went aboard the *Medric* and made a cursory inspection; they found that the vessel leaked considerably, both around the rudder post and the stem, requiring the installation of air-driven pumps with daily pumping and constant watchman's services. Plaintiff's chief engineer of the vessel stated that it had been necessary for him to keep the bilge pumps going most of the time.

A part of the duties of the district material officer was responsibility for the conversion and repair of vessels sent by the Navy to the Philadelphia district for such work.

On the afternoon of October 21, Hall and Burton made a further general inspection of the vessel, certain sheathing and ceiling having, in the meantime, been removed in two or three places. This inspection disclosed that the structural condition of the vessel throughout was poor, with dry rot in the vessel's frame, ceiling, deck planks, beams, etc. The deck beams in the boiler and engine sections were found to be in advanced stages of dry rot. Two frames, exposed by removal of a portion of sheathing or ceiling, were found to be in the last stages of dry rot, and contained worms. The boiler showed signs of leaking at the heads of stay bolts, rivet heads, and fire tube flanges; the surface condenser was leaking.

This inspection disclosed that the ship was not in good operating condition and was not capable of going into service at any place desired by the Navy.

Following the inspection and examination above mentioned, Captain Hall talked to the proper official in the Bureau of Ships in Washington by telephone and gave the Bureau the result of his inspection, his estimate of the cost of repairing and overhauling the vessel, and the approximate time that would be required therefor. Hall was advised that an inspection board from the Bureau of Ships would come to Philadelphia on October 24 to make an inspection and an examination of the ship.

15. The inspection board mentioned in the preceding finding was appointed and was composed of Commander W. A. Sullivan, Lt. Commander E. D. Payne, and Lt. Commander

W. H. Huggitt. These men made an inspection and examination of the *Medric* on October 24, 1941, in company with Captain Hall and Commander J. L. Fisher of the Fourth Naval District. This detailed inspection, a written report of which was submitted October 25, 1941, to the Bureau of Ships and to Commander Yoran, the purchasing officer, confirmed the results of the inspection by Captain Hall and C. O. Burton on October 21 and established the following material facts as to the condition of the *Medric*, which are sustained by the greater weight of evidence submitted in this case.

(a) One frame in the forward hold of the vessel was rotten. The wood in the remaining frames inspected in the forward hold was generally fair but with some loose fastenings and some rot about fastenings.

(b) The framing in the way of the fishhold was not visible for inspection, but a section of bulwark on starboard side in way of this hold was removed which disclosed that the upper portion of the frames so exposed was rotted.

(c) Due to the deteriorated condition of the ceiling in the compartments of the boiler room, a considerable portion of the framing was exposed. All of this exposed framing was in an advanced stage of decay, so much so that large chunks could be pulled off by hand. Samples of this decayed wood are in evidence.

The boilers were secured by stay bolts to frames at these compartments and the wood in the frames through which stay bolts were secured was thoroughly rotted.

(d) Frames that could be exposed in the way of the engine room and afterhold were found to be in an advanced stage of deterioration. Portions of the ceiling and clamps in the way of the wing compartments of the boiler room were in an advanced stage of decay. The ceiling in the engine room was in much better condition, but there was also considerable evidence of decay.

(e) The planking in certain sections of the main deck was in an advanced stage of dry rot. While the deck beams over the engine room were in fair condition, dry rot was evident. The deck beams over the afterhold were in good condition.

(f) The deck beams forward and aft of the machinery spaces were in good condition, but the deck beams in the wing compartments of the boiler room were in an advanced stage of decay. About one-third of the cross section of these decayed deck beams had fallen off, and the wood in the remaining section was badly rotted.

At places new deck beams had been fitted alongside the old beams. This resulted in sagging of the deck.

16. The Government intended to haul the ship out for inspection of hull planking, but this was not done because of the condition found to exist inside the vessel.

17. Because of the condition of the vessel, the work necessary to fit it out for its intended use in the Salvage Service would have cost more than the value of the ship would warrant, and the time required to do this necessary work would have been in excess of that required for new constructcion. A copy of the inspection report referred to in finding 15 was subsequently furnished to plaintiff.

18. November 7, 1941, the Purchasing Officer, Bureau of Supplies and Accounts, wrote plaintiff as follows:

> An inspection of the S. S. *Medric* at the Navy Yard, Philadelphia, discloses conditions which show that the vessel is unfit for its intended service and its acceptance would not be in the interest of the Government.
>
> At a conference in the Navy Department on 9 September 1941, representations were made that the vessel was in a condition which would make it suitable for conversion to a salvage vessel. It is now apparent that the vessel is not in the condition as represented at the time of the negotiation for its acquisition, and that the vessel is not seaworthy or suitable for Navy use.
>
> You are requested, therefore, to remove the vessel from the Navy Yard, Philadelphia, without further expense to the Government.

Plaintiff received this letter but did not reply to it. November 24, defendant wired plaintiff to remove the vessel. Subsequently Richard C. Hayes, the plaintiff, came to Washington and had a conference with Commander Yoran, Bureau of Supplies and Accounts, about the matter prior to December 5, 1941. Just what occurred at that conference does not appear, but it does appear that plaintiff insisted

that as the *Medric* had been previously inspected by representatives of the Navy he assumed that the condition of the vessel was known to the Navy. Following this conference Commander Yoran, purchasing officer, on December 5, 1941, wrote plaintiff a letter, which plaintiff received, in which the reasons for the Government's refusal to accept the *Medric* and execute the contract for the purchase thereof were set forth. In this letter Yoran, after reviewing the representations as to the good condition of the vessel made on behalf of plaintiff in the letter of October 26, 1940, and at the conference with Commander Rawlings September 9, 1941, and the incomplete nature of the reports of the inspections made in May and June, 1941, advised plaintiff as follows:

> In the recent conference in the Bureau of Supplies and Accounts, reference was made to statements by the negotiating officer in the course of the conference as to the soundness and suitability of the vessel are without significance since the negotiating officer had himself made no inspection of the vessel, and was afforded little basis for a judgment by the reports of the three inspections which had been made prior to the negotiations. Such statements of the negotiating officer as those, emphasized by you in your discussion, were made more in reliance on your own representations than on any other basis. Moreover, at several points in the conference, the negotiating officer indicated that there was a possibility that further inspection of the vessel would be necessary.
>
> * * * * *
>
> It is clear from the minutes of the conference for the negotiation of the vessel and the reports of the inspection of the vessel both prior to and after the conference that the vessel was reported by the owner and his authorized representatives as in a condition far better than the actual condition found in the course of inspection as the precedent to the final acceptance of the vessel. The vessel is not in the condition as reported by the owner, and it would not be in the interest of the Government to waive the defects and deficiencies in order to permit its acceptance as in compliance with the terms of the contract.
>
> The certificate of ownership and the bill of sale undertaking to transfer the vessel to the Navy is returned herewith. You are again requested to remove the vessel

from the Navy Yard, Philadelphia, at the earliest possible date. Please advise by return mail when you anticipate the removal of the vessel.

A copy of the report of the inspection at the Philadelphia Navy Yard on October 24, 1941, was enclosed with this letter.

Plaintiff sent a bill, dated December 4, 1941, to the Disbursing Officer at the Philadelphia Navy Yard demanding payment of $87,500 for the *Medric*.

December 20, plaintiff replied to defendant's letter of December 5 returning the bill of sale and insisting upon payment by defendant of $87,500 for the *Medric*. To this letter defendant's purchasing officer, Yoran, replied December 26, 1941, in part, as follows:

> In the negotiations with you for the purchase of the vessel, you stated of the *Medric* that "It is a real nice boat," and of the *Medric* and her two sister ships that "These are exceptional vessels. They are built for tough service." Again, in the course of these negotiations, you stated, "We have never had one minute's trouble with the machinery of the boats. The boilers are about the best there is. We really have got something good. I wouldn't even want to talk about disposing of them if it were not for that law in Jersey." An inspection of the vessel when tendered for delivery to the Navy shows very definitely that the vessel is not now and was not at the time it was offered to the Navy in the condition as represented. The vessel, so far as its condition is concerned, obviously is not the vessel which you offered in the course of the negotiations with you for the purchase of one of three of your vessels.
>
> Whatever inspection may have been made before the negotiations with you for the purchase of the vessel (and it is clearly shown that no thorough inspection was made), the Government possessed the right to conduct an inspection after its delivery for the purpose of determining that it was in fact the vessel and in the condition as represented by you in the course of the negotiations. The inspection clearly shows that the S. S. *Medric* is not in the condition you represented it to be in the course of those negotiations.
>
> You are again requested to remove the vessel at the earliest possible date. The Navy Yard, Philadelphia is being instructed to maintain a record of the costs in-

curred in connection with the vessel, which costs will be reported to you for payment in due course.

19. Plaintiff declined to remove the S. S. *Medric* from the Navy Yard, and the United States has incurred necessary expenses of $6,960.87, to the time of the taking of proof in this case, in the proper care of the vessel.

20. March 3, 1942, plaintiff submitted a bill dated March 2, 1942, to the Disbursing Officer at the Philadelphia Navy Yard and to Commander Yoran, Bureau of Supplies and Accounts, demanding payment of $87,500 for the S. S. *Medric.*

The court decided that the Government had established misrepresentations which amounted to fraud and that plaintiff was not entitled to recover.

The court further decided that defendant was entitled to recover on its counterclaim, representing the actual costs incurred for the care and protection of the vessel after plaintiff's refusal to move it.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff sues for $87,500 for alleged breach by the defendant of a contract of sale by plaintiff to defendant, at the price stated, of the *S. S. Medric.* Defendant refused, for the reasons stated in the findings, to accept and pay for the vessel, and claims in justification of such refusal misrepresentations of material facts which amount to fraud. It has also filed a counterclaim for $6,960.87 representing the actual costs incurred for the care and protection of the vessel after plaintiff's refusal to remove it.

The facts established by the record show, as set forth in the findings, that plaintiff made fraudulent representations of material facts concerning the *Medric* which were properly relied upon by Commander Rawlings, acting for defendant, who was thereby misled into agreeing on a price of $87,500 as fair and reasonable for the vessel. Plaintiff knew, or should have known, that certain representations of material facts which he made concerning the condition of the vessel and of the annual expenditures for repairs and replacements thereof were not true. These material representations were made by plaintiff as an inducement to the

defendant to purchase the vessel and in support of plaintiff's effort to obtain a price of $125,000 therefor. They were made with intent that they should be relied upon. The proof leaves no doubt that Commander Rawlings, who was the officer of the Government duly authorized to carry on negotiations for the purpose of arriving at a fair and reasonable price for the vessel, did rely upon plaintiff's representations in offering a price of $87,500. The defendant was therefore justified in rescinding the agreement as to the price and in refusing to accept the vessel and execute the written contract. *Taylor* v. *Burr Printing Co.*, 26 Fed. (2d) 331; *Keeler* v. *Fred T. Ley & Co., Inc.*, 49 Fed. (2d) 872.

Plaintiff argues that representatives of the defendant made inspections of the vessels before the conference of September 9, 1941, at which the price above-mentioned was agreed upon, and was not, therefore, justified in relying upon any representations of plaintiff concerning the condition of the vessel. These inspections in May and June 1941 are described in finding 3. Reports were made of only two of these inspections. These reports were brief and cursory; they appear to have been based largely upon representations made by plaintiff's representatives; they disclosed little information as to the actual condition of the vessel, and Commander Rawlings had no knowledge or information as to the actual condition of the vessel other than these reports and the representations made by or on behalf of plaintiff in the letter of October 26, 1940, and at the conference of September 9, 1941.

In view of the actual condition of the vessel at the time it was tendered for acceptance, as established by the proof, it is evident that the inspections by Government agents, as to which reports were submitted, were negligently or carelessly made, or reported. The Government cannot be held liable for the negligence, malfeasance, or omission of duty of its agents. Commander Rawlings had the two inspection reports mentioned and used them for what he considered them to be worth, but his testimony shows very clearly that he also materially relied on plaintiff's representations as to the condition of the vessel and other material representations concerning it, as to some of which he had no informa-

tion at all. It is not essential to the right of rescission that representations by plaintiff should have been the sole cause of the action taken by the Government, which claims to have been injured by such representations, but it is sufficient that the representations were one of several inducements and exerted a material influence. Plaintiff's misrepresentations did exert a material influence. It was not necessary that plaintiff's misrepresentations be the paramount inducement to action taken by the Government. Since such representations were a material inducement, rescission may be had although Commander Rawlings was influenced to some extent by information contained in the inspection reports of the agents in the Government service.

Plaintiff argues that no representations upon which the Government was entitled to rely were made at the conference with Commander Rawlings on September 9, 1941, but that what plaintiff's authorized representative said at that time as to the condition of the vessel, the extent of the expenditures for repairs and replacements, and the book value were mere matters of opinion. Plaintiff in a letter of October 26, 1940, to the Navy Department made positive representations as to the condition of the vessel which were not true. We cannot agree that the statements made on behalf of the plaintiff at the conference of September 9 were mere expressions of opinion. The proof shows that the representations made by plaintiff with reference to expenditures for repairs and replacements were false and untrue, and that other statements concerning related matters were misleading. Such representations were not considered by the Government as expressions of opinion, but, on the contrary, were treated and relied upon as representations of matters of fact of reasonable accuracy with intention that they be relied upon. The proof shows that plaintiff's statements were so relied upon, and that they materially influenced the decision on behalf of the Government with regard to the price of $87,500 offered. We think the Government was justified in so relying upon the representations in relation to the annual expenditures for repairs and replacements, and other related values. Instead of being reasonably accurate such representations were false and untrue.

Plaintiff's representative, who had been general manager of the corporation which was the beneficial owner of the vessel since its organization in 1924, was the only person who was in a position to know what the true facts were with reference to the annual expenditures for repairs and replacements, and the book value of the vessel. He knew, or should have known, what these expenditures and values were, and if he did not know he should not have misled the Government into believing that he did. The questions asked by Commander Rawlings at the conference on September 9 with reference to these matters called for a statement of fact and not an opinion, and we think plaintiff's representative so understood and intended that the Government should rely upon his statement that such expenditures for repairs and replacements were between $8,000 and $10,000 a year. After having first made this statement plaintiff's representative further specifically urged the expenditures in the amount stated in support of his effort to influence the Government to agree to pay him his modified price of $100,000. The Government has established misrepresentations which amount to fraud. Plaintiff is therefore not entitled to recover and the petition is dismissed.

Defendant is entitled to recover on its counterclaim, and judgment in its favor for $6,960.87 will be entered. It is so ordered.

MADDEN, *Judge;* and WHITAKER, *Judge*, concur.

WHALEY, *Chief Justice*, dissenting:

I cannot agree with the majority in the manner in which the findings have been made or in the result arrived at in the opinion.

The incorporation of six pages of evidence in Finding No. 5 is contrary to Rule 75 (b) of this Court. This rule requires the Court to make ultimate findings of fact from the evidence and incorporate them in the special findings and not incorporate the evidence.

In my opinion the Court has sufficient time and it is the duty of the Court to separate the ultimate facts from the

irrelevant testimony and incorporate them in special findings and thereby remove any semblance of prejudice, and in doing so comply with the rules of the Court.

I cannot agree with the decision arrived at by the Court in which it finds plaintiff guilty of fraud. This finding is substantially based on the evidence which is incorporated in Finding No. 5. This is a statement taken down stenographically at a meeting between Mr. Thomas Hayes and Commander Rawlings on September 9, 1941, and introduced in evidence at the trial of the case.

The statements made by Mr. Hayes as to the condition of the S. S. *Medric* were based on the inspections made in June 1941 of the hull, boilers, engine, and equipment of the *Medric* by government inspectors of the Department of Commerce, Bureau of Marine Inspection and Navigation. At that time the *Medric* was also placed in drydock for the purpose of having its underwater body and outboard fittings examined. An annual license was issued based on these inspections which showed that the hull, equipment, boilers, and engines were good and the vessel was seaworthy. The inspections made by these officers were under the rules of the Government Bureau and are in minute detail. All water-front men know how strict these inspections are.

Mr. Hayes, when discussing the vessel with Commander Rawlings, was fully justified in making a statement of seaworthiness and soundness, relying on the license issued to him by the Department of Commerce, and the inspections made by these officials of the Government.

However, previous to these inspections in June made by the Department of Commerce, Bureau of Marine Inspection and Navigation, the Navy Department had *three inspections* made; one on May 2, 1941, by Lt. Commander Direlan; another on May 8, 1941, by Commander Sullivan; and a third inspection on June 19, 1941, by Lieutenant Vick, who was accompanied by Mr. C. I. Olsen, Naval Architect. The first two inspections were when the vessel was afloat and the third was when the vessel was hauled out of the water for a complete examination of the underbody. Even borings were made in certain portions of the hull.

Therefore, when Mr. Hayes made the statements to Commander Rawlings, he was stating the true condition of the vessel as disclosed by the examinations of the Government. After five examinations by the Government, through the Department of Commerce and the Navy Department by its own inspectors, had been made, Mr. Hayes had every reason and right to rely on their examinations. The Government did not rely on Mr. Hayes' statement of the condition of the vessel because it had made its own inspections.

The Navy Department made another inspection in October after the meeting in September, and Commander Payne and Mr. Chadwick, U. S. Naval Architect, who made the inspection, urged the prompt delivery of the vessel. This inspection is not set out in the findings but is disclosed by the evidence.

Commander Rawlings stated at the meeting when negotions were on for the purchase price: "According to our information, the boats are in better than average condition." Further on he said: "According to our information, we believe $75,000 would be a fair price." Then again: "There are many ways of keeping them running. I recognize that this boat is above average. There is no doubt about that." Reliance was placed by Commander Rawlings on the information the Navy had received and not the statement of Mr. Hayes. The meeting was plainly for the purpose of arriving at a price and not on the condition of the vessels.

At the request of the Navy Department a bill of sale was executed by plaintiff conveying the vessel to the defendant, and this conveyance was duly registered in the office of the Collector of Customs for New York.

A great deal is made of the fact that Mr. Hayes exaggerated and overestimated the costs of repairs and maintenance during the years of ownership. However, he was talking from recollection at the time and did not have the books of the company before him and he was covering a period of seventeen years.

The defendant did not turn down the vessel on account of the alleged misstatements of the cost of maintenance, repairs, and improvements, because, when the vessel was

rejected by the Navy Department in November 1941, *no examination* of the books of the plaintiff had been made. The examination of the books was made starting in November 1942 and completed in January 1943, more than a year after rejection.

I can find no semblance to fraud in this case.

I am satisfied that the inspections made by the officers of the Bureau of Marine Inspection and Navigation of the Department of Commerce and the three officers of the Navy Department were not careless and negligent. From the evidence the inspections were carefully and painstakingly made.

The final and last examination of the vessel I do not believe disclosed the real condition. It was made by a Board of Officers of the Navy, who examined it for only three hours in a cursory manner and the vessel was not hauled out on the ways.

It was not until after it had been delivered to the Government at the Navy Yard and in the possession of the defendant for several days that it was discovered that another inspection was necessary and the vessel did not pass that inspection. However, the defects discovered were so insignificant that it is impossible to reconcile this examination with the others, which had been made by the Government officials, on any other ground than the desire of the Government to be relieved of its contract. The conclusion is irresistible that the Government had changed its mind and did not want this class of ship, although it had agreed to accept it and the vessel had been delivered at Philadelphia, and the bill of sale therefor recorded on October 29, 1941, in the Custom House at the Port of New York.

After a careful reading of the evidence and exhibits I am convinced that the plaintiff should recover.

JONES, *Judge*, took no part in the decision of this case.

CHICAGO UNION STATION COMPANY, A CORPORATION v. THE UNITED STATES

[No. 43607. Decided February 5, 1945]

On the Proofs

Government contract; judgment against plaintiff for personal injury to employee of plaintiff.—Where it is not shown that the defendant breached its contract by failing to install an adequate ventilating system, as defined and required by the contract; and where the contract between plaintiff and defendant contained no agreement by defendant to indemnify plaintiff for any liability of plaintiff for an accident to an employee of plaintiff; it is *held* that plaintiff is not entitled to recover for a judgment obtained against plaintiff for personal injuries to one of plaintiff's employees.

Same; Government agreement to indemnify against personal injury must be an express contract.—An agreement on the part of the Government to indemnify plaintiff for injuries incurred by plaintiff's employees to be a valid agreement, must be an express contract and not an agreement implied in law. *Sutton v. United States*, 256 U. S. 575; *Enid Milling Company v. United States*, 64 C. Cls. 396.

Same; agreement to require contractor to furnish indemnity bonds.—A contract provision containing an agreement on the part of the Government to require its contractor or contractors to furnish adequate indemnity bond or bonds against damage or injury in connection with the construction of the building contemplated by the contract does not obligate the Government as to an accident after the completion of the building, where the Government's contractor for the construction of the building had no connection with the accident.

The Reporter's statement of the case:

Mr. Caesar L. Aiello for the plaintiff. *Mr. Clement L. Harrell; McKenney, Flannery & Craighill;* and *Loesch, Scofield, Loesch & Burke* were on the briefs.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is an Illinois corporation with its principal office and place of business in Chicago where it has been engaged for many years in the operation of a railroad station

which is used by various railroads, including the Pennsylvania, the Chicago, Burlington & Quincy, and the Chicago & Alton Railroad.

2. By deed dated June 19, 1931, plaintiff, for and in consideration of the sum of $5,500,000, granted and conveyed unto the defendant, for a post office site, a certain tract or piece of land in Chicago, Illinois, bounded on the south by the north side of West Harrison Street, on the west by the east side of Canal Street, on the north by Van Buren Street, and on the east by a driveway thirty feet in width which ran parallel with and east of Canal Street, such tract containing 273,945 square feet more or less. Under the deed plaintiff, as grantor, reserved to itself a permanent and perpetual right, easement, right-of-way, liberty, and privilege to occupy and use for the construction, operation, maintenance, renewal, and renewals of its railroad, railroad tracks, stations, platforms, yards, structures, facilities, and improvements of an area or space situated and lying below a plane or planes at an elevation of seventeen feet above the top of the rail of plaintiff's existing tracks, such plane or planes being projected to the easterly and westerly boundaries of the premises conveyed whether occupied by rails or not and such space being referred to as "subsurface."

3. June 20, 1931, plaintiff and defendant entered into an agreement which made reference to the conveyance referred to in the preceding finding and the erection by the defendant of a building or buildings thereon, and in addition read in part as follows:

> The United States shall include in its proposed building or buildings and thereafter maintain and operate at its own expense an adequate system of ventilation to remove the smoke, fumes and gases emitted from steam locomotives, gas engines or other engines or appliances, such as shall be agreed upon between the Chief Engineer of the Station Company and the Supervising Architect of the Treasury Department of the United States.
>
> All plans, drawings and specifications for said building or buildings shall conform to and be in accord with the drawing No. 1768–A above referred to, in so far as it is applicable, and the work of erecting or constructing said building or buildings, also the work of erecting

or constructing and maintaining said columns, footings, piers and foundations to support the same, as well as all other work connected therewith or incident thereto, shall be done in such manner as not to prevent nor unduly interfere with the suitable and convenient exercise by the Station Company of its rights to occupy and use the subsurface for railroad and station purposes as herein set forth and in doing such work the United States shall cooperate with the Engineers or duly authorized agents of the Station Company to the end that such work shall be conducted and done in such manner as to offer the greatest possible safety to the public and to the persons and property of the owners, employees and users of said station and facilities, and prevent as far as reasonably possible any interference with the use and operating of said station and facilities; * * *.

* * * * *

The United States agrees to require its contractor or contractors for the erection of the substructure and building or buildings to be erected on said land to furnish adequate indemnity bond or bonds, or to provide otherwise, to secure and save harmless the Station Company and/or its proprietary and tenant companies and others from any damage or injury to persons and/or property which may result from the operations of said contractors in connection with the construction of said substructure and building or buildings.

4. August 24, 1931, the defendant entered into a contract with John Griffiths & Sons Company for furnishing the labor and material and performing all of the work necessary to construct a post office on the site referred to in finding 2. That contract contained provisions which were inserted at the request of plaintiff under which John Griffiths & Sons Company was to install and maintain equipment as a temporary ventilating system in order to remove smoke, steam, gas and other exhaust fumes given off by railroad locomotives and trains entering the premises during the period of construction. Plaintiff complained frequently to representatives of John Griffiths & Sons Company and to representatives of the defendant that the temporary ventilating system was not being installed or maintained as contemplated and much of it was not installed or maintained in a manner satisfactory to plaintiff during the period of con-

struction. However, at the time of the accident hereinafter referred to which forms the basis of the damages sought by plaintiff, the portion of the building where the accident occurred had been completed and a permanent system of ventilation installed.

5. Prior to the purchase by the defendant of the site (referred to in finding 2) and the execution of the contract (referred to in finding 3) consideration had been given to the problem presented of having the post office building erected over the subsurface area where plaintiff's railroad tracks were located. March 8, 1931, a drawing No. 1768–A (which is referred to in the quotation from the contract set out in finding 3) was prepared by plaintiff showing the proposed column and track location under the proposed post office building. In that connection consideration was given by plaintiff and defendant to the designing of a ventilating system which would remove the smoke and gas from the subsurface area upon the construction of the post office building. The situation presented was in a general sense a pioneering job since only two or three similar situations had ever arisen as far as the parties then knew and these involved much smaller projects than the one under consideration. The defendant employed Graham, Anderson, Probst & White, a reputable firm of architects of Chicago, Illinois, to design a ventilating system which would adequately remove the smoke and gases from the subsurface area. Plaintiff's engineers cooperated with these architects in their work and many conferences were held at which suggestions were considered. Finally on December 23, 1931, the architects forwarded to the chairman of plaintiff's Advisory Board of Engineers a description of the ventilating system which had been designed. (That description is in evidence as plaintiff's Exhibit 4 and it is incorporated herein by reference.) After consideration of the proposed plan, plaintiff's chief engineer advised the architects on January 6, 1932, as follows:

> Your letter of December 23, 1931, to Mr. I. W. Geer, Chairman, Advisory Board of Engineers of the Chicago Union Station Company, was received by him on December 28, with plans and description of the ventilating and smoke removal system to be incorporated in the

Post Office building over the Union Station Company's sub-space, which plans and description were requested at a meeting with you December 14, 1931.

The plans and description you furnish, together with the explanation you made to the Advisory Board on December 14, 1931, have had careful consideration, with the result that we are convinced that the proposed smoke removal system is inadequate and will not serve the purpose contemplated under our agreement with the Government. The major defects of the plans are: Insufficient number of stacks or outlets, and the distribution of these outlets; volume and restriction of the smoke chamber; insufficient volume and velocity of air through the ventilating system; and other features which affect the sufficient and uniform ventilation of the area over the Station Company's tracks and facilities.

We realize the importance of this matter, and will be glad to cooperate with you in an effort to reach an acceptable plan at your convenience.

6. On January 11, 1932, a conference was held in connection with the proposed plan and the objections made thereto by plaintiff's representatives at which time certain features of the plan were approved and recommendations were made for certain changes and additions. Pursuant to the agreement on recommendations for changes in and additions to the system, drawings were submitted by the architects to plaintiff and on February 12, 1932, plaintiff's chief engineer advised the architects as follows:

Referring to your letter of February 10th, 1932, enclosing copy of letter from Jas. A. Wetmore, dated Feb. 8th, 1932, and your letter of Feb. 12th, 1932, asking for approval of certain features of the track ventilating system.

I am returning herewith one print each of your drawings #404A and HV–R330A, covering cast iron frames and changes in track ventilating fans to conform with the agreement made in your office January 11th, 1932, and have indicated my approval of same.

In regard to the use of steel instead of acid resisting material as specified for the fans and certain accessible ducts, it will be agreeable to the Station Company to make the substitutions outlined in your letter of Feb. 12th, 1932, provided we are assured that this equipment will be adequately maintained so as to prevent frequent repairs, renewals, and interruptions to the service.

It should be understood that our approval of any features of this ventilating system should be considered as a concurrence in what appears to be the best design and does not relieve the U. S. Government from any responsibility to provide and maintain an adequate system of track ventilation as covered by agreement of June 19th, 1931.

In cooperating with defendant's representatives in connection with the designing of a ventilating system and its installation and in indicating its approval thereof, plaintiff consistently qualified such approval in a manner similar to that set out in the last paragraph of the letter quoted above.

7. In the meantime John Griffiths & Son Company was proceeding with the construction of the post office building and the installation of the ventilating system in accordance with the design as finally modified as shown in the preceding findings. The building was constructed in two sections, the westerly section being completed first, and as that section was erected the ventilating system was progressively installed therein. By about February 1, 1933, the westerly section had been completed and by that time the permanent ventilating system for that section had been completely installed and was in operation.

The easterly section of the building was thereafter constructed and the entire building accepted by the Government approximately one year later.

8. While the ventilating system as designed represented what the parties concerned considered at that time an adequate system for the purpose for which it was designed, it did not prove adequate primarily because it failed to remove the gas and smoke during certain atmospheric times from the subsurface area as rapidly as the situation required. As a result the movement of trains was interfered with at certain atmospheric times and conditions within the subsurface area were dangerous both to patrons using the station and to employees of plaintiff who were required to work therein. Plaintiff complained from time to time to defendant about the conditions, its letter of December 22, 1932, reading as follows:

Relative to the meeting in my office, yesterday morning, with the architects, contractors, and our engineering staff, about smoke conditions under the post office:

I trust you are impressed with the fact that the disposal of smoke in this area is your problem, and that you will leave nothing undone to solve it satisfactorily, so as to avoid the danger under which we are now operating. We will lend you all assistance possible and do everything in our power to aid you in arriving at a satisfactory disposition of the matter.

On December 30, 1932, plaintiff wrote defendant again in regard to the situation and made certain specific recommendations for improvements. After most of the recommendations had been carried out, plaintiff wrote defendant on February 1, 1933, as follows:

I wrote to you on December 30, offering suggestions for improving the visibility and gas conditions under the post-office area, most of which have been acted upon, greatly improving the situation. Within a week or two you are going to enter into a new construction phase which may materially alter the conditions, and I would ask that sufficient study of the matter be made so we may be assured that, as the second stage of the building progresses, the ventilation of the track area will not be interfered with in such a way that we will have to go through conditions such as we encountered before corrective measures were taken.

The suggestion we made for ventilating the present track area with auxiliary fans in the ramp chamber to create an air movement towards the east has not been acted upon, and it may be, as the building progresses, that several auxiliary or temporary fans will have to be installed to ventilate the track area, exhausting through temporary ducts over the so-called mail driveway. I do not know that this is the cheapest solution of the matter, but I do know that temporary fans installed in the locations suggested in the new building, on the first floor, above the track area, exhausting to the east side of the Van Buren building, will materially improve the conditions.

We will study the matter as the work progresses, offering suggestions from time to time, and be as helpful as we can in meeting the problem.

9. Because of repeated complaints and the failure of the ventilating system to solve satisfactorily the problem for which it was designed, defendant began a study of the entire situation about 1935 and in January or February 1936 en-

tered into a contract with plaintiff for major improvements to the entire system. This work was carried out by plaintiff over a period of approximately two years and was completed at a cost to defendant of some five or six hundred thousand dollars. A part of the reason for the improvements was that gases had set up chemical reactions which had caused corrosion and deterioration of some of the ventilating equipment but this condition had not reached the point in February 1933 where it had adversely affected the operation of the ventilating equipment. While the revised system is much more satisfactory than the original system, there continue to be occasions, under certain atmospheric conditions, where gases and smoke interfere with the operations of trains and make the conditions dangerous for persons required to work in the subsurface area.

10. In the meantime on February 6, 1933, at or about 5:45 p. m., Frank X. Thisdalle, an employee of plaintiff, while driving a tractor which was pulling a load of mail, suffered a serious injury in which he sustained a fracture of his right leg. Before sustaining the injury, Thisdalle had driven the tractor in a northerly direction from Harrison Street to a point by track No. 2 under Canal Street. Shortly before the accident a cloud of smoke and steam from an engine standing on track 4 (which was also under Canal Street) made it impossible for Thisdalle to see where he was going. After proceeding slowly in the smoke and steam for some 300 feet, he got off the tractor to ascertain where he was going and in so doing stepped off the platform onto track 2 and pulled the tractor loaded with mail on his legs. There were no guard rails on the platform from which Thisdalle fell. He was given first aid at the time and then taken to a hospital where he remained fourteen months.

11. The point where the accident occurred was not beneath the premises conveyed to the defendant but was between tracks 2 and 4 in an area under Canal Street adjacent to and west of the subsurface area under the post office building. Two of plaintiff's tracks, Nos. 2 and 4, came into that area near the point where the accident occurred, and these tracks were used in a manner similar to the other tracks under the post office building. There was no partition or

separation between the subsurface area under the building and that under Canal Street. The ventilating system which was designed and installed contemplated its removal of smoke and gases from the area under Canal Street as well as the subsurface area under the building, but because of the Canal Street construction and sidewalk thereon the smoke chamber which was provided for the subsurface area could not be extended to include the area under Canal Street and the provision which was made in the ventilating system for that area did not contemplate as rapid smoke removal as in the subsurface area under the building. The area under Canal Street presented a difficult problem for smoke removal which has not been entirely solved by the improved system now in operation—particularly under atmospheric conditions similar to those which prevailed at the time of the accident in question when it was very cold and snowing and the removal of smoke was a difficult operation.

12. May 25, 1934, Frank X. Thisdalle filed suit against plaintiff in the Superior Court of Cook County, Illinois, to recover $75,000 damages alleged to have been sustained by him as a result of the accident mentioned above. One of the counts alleged in the complaint was that the Chicago Union Station Company had failed and neglected to furnish Thisdalle with a proper and safe loading platform upon which to drive and operate a tractor and negligently and carelessly allowed the platform where he was required and instructed to load mail to be in an extremely unsafe, dangerous and hazardous condition in that there were no rails, guards, or fences at or on the platform to protect him and the tractor or mail car from running off. In the other count it was alleged that the Chicago Union Station Company negligently, carelessly and improperly permitted and allowed smoke, steam, fumes and gases to become and remain so heavy and dense at the point where Thisdalle was required to work and drive the tractor that it was impossible for him to see and find his way while driving and operating his tractor.

13. The Chicago Union Station Company denied the complaint on both counts supplemented by certain affirmative allegations and qualifications not here material. At no

time did the Chicago Union Station Company notify the Government that the suit was pending nor seek its aid in the defense. After the trial, judgment was entered in favor of Thisdalle against the Chicago Union Station Company on September 18, 1934, in the sum of $11,950 together with costs but there is no proof as to whether the judgment was entered upon the first or second count or on both counts of the complaint. The Chicago Union Station Company paid the judgment and costs and in addition from time to time paid out amounts because of the accident, such amounts being as follows:

Judgment	$11, 950. 00
Clerk of Superior Court of Cook County:	
Appearance fee	5. 00
Costs	25. 00
Frank X. Thisdalle, wages during period of confinement	1, 410. 00
Washington Boulevard Hospital, for medical treatment, X-rays, board, etc	$1, 624. 23
Dr. A. R. Metz for professional services rendered to Thisdalle	709. 00
Ambulatory Pneumatic Splint Mfg. Co., for leg brace for Thisdalle	35. 00
Attorneys' fees for defending case of Thisdalle v. Chicago Union Station Co	1, 710. 00
Total	17, 468. 23

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff seeks to recover an amount which it paid on account of injuries sustained by one of its employees.

On June 19, 1931, plaintiff sold a tract of land in Chicago to the defendant for use as a post office site. In the deed plaintiff reserved to itself, for use as a part of its railroad station, a perpetual subsurface easement for the first seventeen feet above the railroad tracks running through the premises conveyed. On the following day, plaintiff and defendant as a part of the same transaction entered into a contract which contained the following provisions:

> The United States shall include in its proposed building or buildings and thereafter maintain and operate at

its own expense an adequate system of ventilation to remove the smoke, fumes, and gases emitted from steam locomotives, gas engines or other engines or appliances, such as shall be agreed upon between the Chief Engineer of the Station Company and the Supervising Architect of the Treasury Department of the United States.

* * * * *

The United States agrees to require its contractor or contractors for the erection of the substructure and building or buildings to be erected on said land to furnish adequate indemnity bond or bonds, or to provide otherwise, to secure and save harmless the Station Company and/or its proprietary and tenant companies and others from any damage or injury to persons and/or property which may result from the operations of said contractors in connection with the construction of said substructure and building or buildings.

Defendant's architects designed a ventilating system to carry out the first paragraph of the contract quoted above and, after various conferences between plaintiff's chief engineer and defendant's architects, a design was agreed upon which met the approval of both parties. Defendant's contractor proceeded with the construction of the building, including the ventilating system. The building was constructed in two sections, the westerly and easterly sections. By February 1, 1933, the westerly section had been completed including the permanent ventilating system which was then in operation. In addition to the subsurface area under the building as to which plaintiff had reserved a perpetual easement, plaintiff had a further area adjacent thereto which it likewise used in its station operations. This latter area was under Canal Street but it was not included in the deed for the post office site nor referred to in the contract between the plaintiff and defendant. However, in designing and installing the ventilating system, defendant made provision for the removal of smoke and gases from that area and that portion of the ventilating system was in operation at the time the accident hereinafter referred to occurred in that area.

On February 6, 1933, one of the plaintiff's employees was injured while driving a tractor and loaded mail truck in the Canal Street area. At the time of the accident, the employee's vision was obstructed by smoke and vapor from a

train standing on a track in that area. The employee brought suit and recovered a judgment against plaintiff for $11,950. In addition, plaintiff paid certain attorneys' fees in the defense of the suit, medical expenses of the employee, and wages to the employee during his period of confinement. The total amount so paid, including the judgment and these other expenses, was $17,468.23. No notice was given by plaintiff to defendant of the pendency of that suit. Plaintiff in this suit seeks to recover that amount on the ground that defendant breached its contract by failing to install an adequate ventilating system and because of such breach defendant is required under the contract to indemnify plaintiff for the loss which it sustained in being required to make payments on account of this injury to its employee.

We do not think that the defendant has breached its contract.

Under the contract defendant agreed to "include in its proposed building or buildings and thereafter maintain and operate at its own expense an adequate system of ventilation * * * such as shall be agreed upon between the Chief Engineer of the Station Company [plaintiff] and the Supervising Architect of the Treasury Department of the United States." About three months prior to the execution of the contract, preliminary negotiations were going on between the plaintiff and defendant with respect to the purchase of this site and the problem of having the post-office building erected over the subsurface area where plaintiff's railroad tracks were located. Both the plaintiff and the defendant recognized the difficulties in installing a ventilating system in the subsurface area. The same problem had arisen in only two or three prior instances and difficulties were encountered in their solution.

The defendant employed a reputable firm of architects to design a ventilating system and the plaintiff cooperated with defendant's representatives and these architects in the design both prior to and subsequent to the execution of the contract. The record shows that defendant's architects and representatives conferred with plaintiff's chief engineer relative to the details of the system and made changes and additions which plaintiff's engineer considered necessary in the

design of an adequate ventilating system. The system was installed in accordance with the design as thus prepared and agreed upon and was in operation at the time of the accident.

The defendant has continued to make improvements in the system pursuant to its obligation to install, maintain, and operate such a ventilating system as was agreed upon between its architects and the chief engineer of plaintiff.

We are of the opinion that defendant met its obligations within the reasonable contemplation of the parties. Plaintiff's position is unreasonable as shown by the testimony of two of its witnesses. One witness testified that the system was inadequate because it failed to remove the smoke and gases immediately from the subsurface area and another witness on cross-examination admitted that it would be impossible in his opinion to install a system which would accomplish that complete purpose. The agreement must be interpreted in the light of the parties' intention, and what they sought to accomplish, and not as contemplating some impossible or impractical undertaking.

We are unable to find from the contract or acts of the parties any breach for which the defendant could be held liable for the accident to plaintiff's employee. It is true that the ventilating system, agreed upon by defendant's architects and plaintiff's chief engineer, did not accomplish as much as they had hoped but the defendant proceeded, pursuant to its obligations, to make further improvements in the ventilating system as situations developed.

A different question would have been presented had this suit been for a failure on the part of the defendant to make an installation which plaintiff requested or for failure to make improvements desired by plaintiff. Plaintiff contends that any approval given by its chief engineer and its other representatives was only a qualified approval of the character referred to in the chief engineer's letter of February 12, 1932, which is set out in finding No. 6. However, that letter does not indicate lack of approval of the design. It seeks to protect plaintiff against any defects or deficiencies in the system which might later develop. In other words, the chief engineer is saying that he is approving the design as modified in accordance with his suggestions as the "best design" but

that, in the event the system as installed proves inadequate in any particular, his approval must not be construed as relieving the defendant of its obligation to make further improvements therein.

However, plaintiff is not asking in this suit that improvements be made in the system, or that it be made whole on account of deficiencies which it corrected. It seeks reimbursement for an amount which it paid out in a tort action brought against it by one of its employees.

Since the defendant is not suable in tort without its consent, and no general consent has been given, the right of recovery, if it exists, must come from express contract provisions, and cannot arise by implication of law. *Sutton* v. *United States*, 256 U. S. 575; *Enid Milling Company* v. *United States*, 64 C. Cls. 396.

Plaintiff contends that such an express provision is contained in the contract wherein—

> The United States agrees to require its contractor or contractors for the erection of the substructure and building or buildings to be erected on said land to furnish adequate indemnity bond or bonds, or to provide otherwise, to secure and save harmless the Station Company and/or its proprietary and tenant companies and others from any damage or injury to persons and/or property which may result from the operations of said contractors in connection with the construction of said substructure and building or buildings.

This, however, relates to damage or injury to persons or property which might result from the operations of the contractor in connection with the construction of the building, whereas the accident with which we are concerned did not occur in connection with the construction of the building and defendant's contractor was in nowise connected therewith. When the accident occurred the section of the building adjacent to the scene of the accident had been completed and a ventilating system for that section, including the subsurface area extending beyond which included the scene of the accident, had been completed and was in operation. An obligation for the contractor to furnish an indemnity bond or to provide otherwise to save plaintiff harmless from injuries to persons during the period of construction could not

be extended to make defendant liable for injuries sustained by plaintiff's employees which were in no sense connected with the construction of the building. The accident to plaintiff's employee did not occur in the subsurface area beneath the building which was constructed on land acquired from plaintiff. It occurred on an adjacent area for which defendant undertook to provide a ventilating system when carrying out its obligation under the contract to provide a ventilating system.

In order to hold defendant liable it would be necessary to imply an agreement on the part of defendant to remove the smoke from the adjacent area and also to imply an agreement to save the plaintiff harmless from any tort action which might arise because of inadequacies in the ventilating system. We are unwilling to so hold. Express contract provisions would be necessary to raise such unlimited tort liability. They are not present in this case.

In view of what we have said, it becomes unnecessary to consider the further defenses offered by the defendant.

The petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

JOHN R. DIXON v. THE UNITED STATES

[No. 45928. Decided February 5, 1945]

On the Proofs

Damages to oyster beds in river and harbor improvements; jurisdiction under the 1935 Act.—The provision in the Rivers and Harbors Act of 1935 (49 Stat. 1028) giving the Court of Claims jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements by the Government was not confined to improvements mentioned in that particular Act but was a general provision placed in a special act, and related as well to river and harbor improvements, authorized by subsequent acts, which might cause injury to oyster growers.

Same; not necessary to prove negligence under the 1935 Act.—The general provision in the Rivers and Harbors Act of 1935 giving the Court of Claims jurisdiction to hear and determine claims for damages to oyster growers followed the decision in *Radel Oyster Company* v. *United States*, 78 C. Cls. 816, and the words "such improvements" referred to river and harbor improvements in general and did away with the necessity of the plaintiff proving negligence on the part of the Government's agents.

Same; general law in special acts.—Congress has repeatedly placed general law in special acts. See *Townsley* v. *United States*, 101 C. Cls. 237; affirmed 323 U. S. 557.

The Reporter's statement of the case.

Mr. Hugh H. Obear for the plaintiff. *Mr. Willis E. Cohoon* was on the brief.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows, upon the stipulation of facts entered into by the parties:

1. On July 18, 1940, and at all times thereafter pertinent, plaintiff was the lessee, by lease described as File 1957, from the State of Virginia of a parcel of 18.20 acres of oyster grounds located in the Nansemond River, in the vicinity of Norfolk, Virginia.

2. By the Rivers and Harbors Act of 1940, 54 Stat. 1198, various works of improvement were listed, adopted and authorized, to be prosecuted under the direction of the Secretary of War and under the supervision of the Chief of Engineers, including the dredging of a channel, in Portsmouth Harbor, Virginia, to the Nansemond Ordnance Depot.

3. Pursuant to the authority granted by the Rivers and Harbors Act of 1940, as set forth in paragraph 2 above, plans were made and money allotted for the dredging of a channel 100 feet wide and 12 feet deep from deep water in Hampton Roads to a described locality adjoining the Nansemond Ordnance Depot.

4. As a result of inquiry made of the Commission of Fisheries, Commonwealth of Virginia, the War Depart-

ment was informed that the proposed channel would traverse the parcel of oyster land leased to plaintiff as aforesaid.

5. On August 9, 1940, the War Department by letter notified plaintiff of the intended dredging and that it would traverse his oyster ground described above. On August 10, 1940, the War Department likewise notified the Commission of Fisheries, Commonwealth of Virginia, of the proposed dredging. Both of said letters stated that the dredging was expected to commence about October 15, 1940.

6. Dredging was commenced on April 29, 1941, and completed according to plan on August 19, 1941.

7. The dredging was done by a private contractor under contract with defendant, and was done carefully, skilfully and with as little injury to plaintiff's oyster interests as was possible, consistent with the nature and amount of dredging to be done.

8. Shortly after the completion of the dredging, defendant's District Engineer at Norfolk, Virginia, caused an investigation to be made of plaintiff's claim that his oyster beds and other interests appurtenant thereto had been injured by the dredging. As a result of this investigation it was determined by the District Engineer that plaintiff's oyster beds and interests had been injured to the extent of at least $4,000. The District Engineer accordingly forwarded to the Chief of Engineers plaintiff's claim, alleging damages in the amount of $4,000, with the recommendation that the claim be allowed. The recommendation was concurred in and approved by the Division Engineer but the claim was ultimately rejected by the Chief of Engineers on the ground that the matter was not one for adjustment by the War Department since in his opinion jurisdiction to hear and determine such claims had been conferred on the Court of Claims by section 13 of the Rivers and Harbors Act of 1935, 49 Stat. 1028.

9. By the Rivers and Harbors Act of 1935, 49 Stat. 1028, a list of specified works of improvement of rivers, harbors, and other waterways was adopted and authorized, to be prosecuted under the direction of the Secretary of War and under the supervision of the Chief of Engineers. It

was further provided by said act that thereafter Federal investigation and improvements of rivers, harbors, and other waterways should be under the jurisdiction of and be prosecuted by the War Department under the direction of the Secretary of War and the supervision of the Chief of Engineers, except as might otherwise be specifically provided by Act of Congress. Section 13 of said act provides:

> That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements: *Provided*, That suits shall be instituted within one year after such operations shall have terminated.

10. By an Act of Congress (78th Cong., 1st Session, H. R. 2614) approved July 13, 1943, it is provided that section 13 of the Rivers and Harbors Act of 1935, set forth above, is amended to provide that suits brought under said section 13 of the Act "shall be instituted within two years after such operations shall have terminated."

11. The dredging of the channel in Portsmouth Harbor to the Nansemond Ordnance Depot is not one of the works of improvement of rivers, harbors, and other waterways listed, authorized, and adopted in the Rivers and Harbors Act of 1935, but was first listed, authorized, and adopted by the Rivers and Harbors Act of 1940, above.

12. Defendant, in the event that the court shall determine that it has jurisdiction of plaintiff's claim under section 13 of the Rivers and Harbors Act of 1935, as modified by the Act of July 13, 1943, does not and will not object to entry of judgment for plaintiff in the amount of $4,000. Plaintiff waives and abandons any and all other claims for injuries done to its oyster beds and other interests appurtenant thereto in the Nansemond River by the dredging done by defendant in the spring and summer of 1941 and by any and all other dredging done by defendant in the Nansemond River between July 18, 1940, and the date of this stipulation, namely, July 20, 1944.

13. No person other than plaintiff is the owner of the claim asserted in the present suit, and no assignment of said

claim or any part thereof has been made. Plaintiff is a citizen of the United States and a resident of the State of Virginia.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the Court:

The plaintiff is suing for damages to his oyster beds caused by the dredging operations authorized by the defendant. Notice of the dredging was duly given by the War Department to the plaintiff and to the Commissioner of Fisheries of the Commonwealth of Virginia. The dredging was completed by defendant's contractor. The oyster beds were traversed and as little injury done to plaintiff's oyster interests as was possible, consistent with the nature and amount of dredging performed. The District Engineer recommended to the Chief of Engineers the payment of plaintiff's claim in the sum of $4,000.00. Both parties agree on the damages and the amount recommended as being reasonable. The sole question raised is one of law.

The plaintiff is suing under Sec. 13 of the Rivers and Harbors Act of 1935, 49 Stat. 1028, which reads as follows:

> That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operation and use of other machinery and equipment in making such improvements; *Provided*, That suits shall be instituted within one year after such operations shall have terminated.

(U. S. C. Title 28, Sec. 250a; 49 Stat. 1049, as amended).

The dredging which caused the damage to plaintiff's oyster grounds was not mentioned in the Rivers and Harbors Act of 1935 but was listed, authorized, and adopted by the Rivers and Harbors Act of 1940. A special private act was passed on September 30, 1944, Private Law 396—78th Congress, Chap. 466—2d session, after suit on this general act was commenced, giving the Court jurisdiction of the claim.

The defendant has raised the question that the Court of Claims has no jurisdiction of this claim for the reason that the words "such improvements" in the 1935 Act refer to improvements mentioned in that particular act and do not

apply to subsequent acts which provide for harbor improvements. The contention is that it is a special act applying to special cases named in the special Rivers and Harbors Act 1935 only.

We do not so construe the provision. It is a general provision of law placed in a special act to cover improvements of rivers and harbors through which damage is caused to the property of others, not only those improvements which are mentioned in that act but to those improvements which may be authorized by subsequent acts and which may cause injury to oyster growers.

Heretofore Congress passed special acts allowing suit to be brought when oyster beds had been damaged by dredging authorized by the Rivers and Harbors Acts. *Radel Oyster Company* v. *United States*, 78 C. Cls. 816; *Mansfield, et al.* v. *United States*, 94 C. Cls. 397; and *Shroeder Besse Oyster Co.* v. *United States*, 95 C. Cls. 729.

The Board of Rivers and Harbors Engineers, under whom these improvements were made, was fully aware that damages resulted from the use of modern suction dredges. In *Bailey* v. *United States*, 62 C. Cls. 77, it was held that oyster lands below low-water mark were within the sovereign right to improve navigation and did not amount to a taking of private property for public use.

This Court in 1934 decided the *Radel Oyster Company case*, *supra*, which was brought under a special act, and held that the plaintiff had to prove the negligence of the Government. It was shown that the act of the agent was a tort for which the defendant would not be liable but for the special act giving this court jurisdiction for damages to oyster beds in Navigable waters. This general provision was placed in the 1935 act following that decision and the words "such improvements" referred to river and harbor improvements in general and did away with the necessity of the plaintiff proving negligence on the part of the Government's agents. Under it oyster growers have only to prove damages as a result arising from dredging operations for harbor improvements and that the Government used machinery and equipment in making such improvements.

The rule that special acts are to be strictly construed is not disturbed. This is not a special act but a general provision of law, giving jurisdiction to the Court of Claims to hear claims of oyster growers for damages, placed in a special Rivers and Harbors Act. Congress has repeatedly placed general law in special acts. See *Townsley* v. *United States*, 101 C. Cls. 237, affirmed by the Supreme Court January 16, 1945. Appropriation acts frequently carry general provisions. The Act of 1935 was an authorization act and it required an appropriation to carry out the provisions of the Act.

The amount of damages is not in controversy. Plaintiff is entitled to recover $4,000.00. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

CRYSTAL SOAP & CHEMICAL COMPANY, INC. v. THE UNITED STATES

[Nos. 45544, 45545, 45546. Decided February 5, 1945]

On the Proofs

Government contract; decision of contracting officer final.—Under the provisions of the contract entered into by the plaintiff with the Government, in case No. 45544, to supply a quantity of rust compound the question of whether the rust compound met the required specifications was a question of fact to be decided by the contracting officer, whose decision was final under the contract, and plaintiff is not entitled to recover. *Fleisher Engineering & Construction Company, et al.* v. *United States*, 98 C. Cls. 139, 155.

Same; offsets by Government in cases Nos. 45545 and 45546 were proper.—Where the Government withheld from sums admittedly due to plaintiff under separate contracts the extra costs which the Government incurred by reason of the failure of the rust compound (case No. 45544) to meet the Government's tests; it is *held* that such offsets by the Government were proper and the plaintiff is not entitled to recover in cases Nos. 45545 and 45546.

The Reporter's statement of the case.

Mr. B. J. Gallagher for the plaintiff.

Mr. J. J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

For the purposes of the findings of fact and opinion the above cases are consolidated.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized under the laws of the State of Delaware, and has its principal office and place of business in Philadelphia, Pennsylvania.

2. On August 6, 1938, the plaintiff, under contract No. W-928-QM-29173, Purchase Order No. M-280, was awarded a contract by the War Department for 3,504 gallons of rust preventive compound, at a unit price of $0.536, total $1,878.14, to comply with U. S. Army specification #2-84 A, to be delivered f. o. b. Benicia Arsenal Wharf, Benicia Arsenal, Calif., within 35 days from receipt of notification of award, with 1% discount for payment within ten calendar days.

Paragraph 4 of the purchase order in Case 45546 provides in part as follows:

> (a) All material and workmanship shall be subject to inspection and test at all times and places and, when practicable, during manufacture. The Government shall have the right to reject articles which contain defective material or workmanship. Rejected articles shall be removed by and at the expense of the contractor promptly after notification of rejection.
>
> * * * * *
>
> (c) Final inspection and acceptance of materials and finished articles will be made after delivery, unless otherwise stated. * * * Final inspection shall be conclusive, except as regards latent defects, fraud, or such gross mistakes as amount to fraud. * * *
>
> * * * * *

Paragraph 12 of the purchase order in case 45546 reads as follows:

> *Disputes.*—Except as otherwise specifically provided in this Purchase Order, all disputes concerning questions of fact arising under this Purchaser Order shall be decided by the contracting officer or his duly author-

ized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the performance.

3. Specification #2–84 A in case 45546 provided under "Material and Workmanship":

C–1. Medium rust preventive compound shall be a homogeneous, stable, noncorrosive, nondrying, nonpoisonous, rosin-free, semisolid material; positively adherent to metal surfaces at temperatures as high as 122° F., and readily removable from metal surfaces by use of a suitable solvent.

Under "Methods of Inspection and Test" it provided:

F–2*g*. *Adhesion and protection.*—

F–2*g*. (1). Prepare five plates of cold-rolled strip steel, WD 1020, approximately 2″ by 3″ in size, with all edges rounded, by mechanically polishing and drying as in *f* above. Dip one of these plates in the as-received compound, heated to such a temperature as will completely liquefy it, for sufficient time to secure a coating approximately three sixty-fourths of an inch in thickness on the plate, and weighing not less than 3 grams. This plate shall be suspended for 4 hours in an oven heated to 122° F. Slipping, sagging, or dripping of the film shall be cause for rejection.

F–2*g*. (2). The material for coating the remaining four plates shall be heated for one-half hour in a shallow vessel on a steam bath for the removal of the volatile matter. Dip these four plates in the compound, heated to such a temperature as will completely liquefy it, for sufficient time to secure a coating of approximately three sixty-fourths of an inch in thickness on the plates. One of these plates shall be exposed to the weather in an unshaded location so that plate shall be inclined at an angle of 45° to the vertical, facing south for a period of 30 days. The second plate shall be hung in an oven of 100 percent humidity at 100° F., for 7 days. The third shall be exposed to ultraviolet ray light for the same period; and the fourth shall be placed alternately in the 100 percent humidity oven for 19 hours and then in the ultraviolet ray light for 5 hours; then back in to the high humidity again for 7 days.

F–2*g*. (3). Following the prescribed exposure, all the plates shall be heated to the melting point of the com-

pound, and swung in a suitable solvent such as cleaners' naphtha or gasoline, that will dissolve the coating, and rinsed in clean solvent. Under critical examination with a miscroscope, in both direct and indirect light, there shall be no evidence of rusting.

The laboratory directions, so prescribed, allowed of a variation in technique by reason of which it was possible for different laboratories to arrive at varying results.

4. On November 14, 1938, the San Francisco laboratory of the National Bureau of Standards, United States Department of Commerce, reported to the commanding officer, Benicia Arsenal, Benicia, California, the result of a test made according to specifications of sample taken from delivery tendered by the plaintiff under its contract to furnish the rust preventive compound. As to adhesion the test was reported as unsatisfactory.

The commanding officer thereupon, November 17, 1938, notified the quartermaster supply officer at the San Francisco General Depot, as to the result of the test, that plaintiff's shipment was accordingly rejected, and requested that immediate action be taken to obtain replacement by the vendor and that instructions be furnished as to disposition desired of the rejected compound.

Defendant's representatives demanded immediate replacement by plaintiff of the rejected compound; the plaintiff vigorously maintained that the test by the Bureau of Standards was improperly conducted and was inconclusive, asked for recheck and stated that it was having a test of its own made.

Test of a sample retained by the plaintiff was conducted for plaintiff by a firm of Philadelphia chemists who November 26, 1938, reported a satisfactory adhesion test, and this report was immediately communicated by plaintiff to the quartermaster supply officer at San Francisco.

Plaintiff also had tests made by San Francisco chemists, and these also reported the material satisfactorily passed the adhesion test.

The San Francisco laboratory of the National Bureau of Standards, December 1, 1938, reported to the commanding officer, Benicia Arsenal, Benicia, Calif., the result of test on a second sample, and this reported a failure on the adhesion.

The quartermaster supply officer thereupon demanded of the plaintiff prompt substitution of a satisfactory compound, and requested to be informed as to the disposition desired of the rejected compound.

The San Francisco laboratory of the National Bureau of Standards, December 20, 1938, again reported to the quartermaster supply officer at San Francisco failure of adhesion test on the second sample of plaintiff's rust preventive compound. Again, December 30, 1938, the San Francisco laboratory made a like report on six samples.

At plaintiff's request a test of the compound was made on January 9, 1939, by the Washington office of the National Bureau of Standards in the presence of plaintiff's representatives. This test showed that the compound satisfactorily passed the adhesion test. The Bureau of Ordnance so notified the commanding officer of the Benicia Arsenal on January 11, 1939, and recommended acceptance of the shipment. The commanding officer replied by radio, however, on the same day as follows:

> REFERENCE RADIO JANUARY 11 SAMPLE MEDIUM RUST PREVENTATIVE COMPOUND SUBMITTED YOUR OFFICE WAS FROM LOT NUMBER THREE ONLY STOP THIS LOT AND REMAINING SEVEN LOTS HAVE ALL FAILED IN ADHESION TESTS CONDUCTED BY BUREAU OF STANDARDS STOP (50) NOT THIRTY DAY TEST HAS BEEN MADE ON ANY LOT STOP SHOULD THIRTY DAY TEST BE CONDUCTED ON ALL EIGHT LOTS QUES IN VIEW OF FAILURE REPORTED BY BUREAU OF STANDARDS UNDER PARAGRAPH F DASH TWO G U S SPECIFICATION TWO DASH EIGHTY FOUR A ACCEPTANCE OF SHIPMENT DEEMED INADVISABLE

In reply the Bureau of Ordnance at Washington wired the commanding officer at Benicia Arsenal on January 20, 1939, as follows:

> REFERENCE YOUR RADIO JANUARY ELEVENTH comma BUREAU OF STANDARDS RETEST OF SAMPLE MEDIUM RUST PREVENTIVE COMPOUND SHOWS FAILURE OF ADHESION TEST period CANCEL RECOMMENDATIONS IN OUR RADIO OF JANUARY ELEVENTH REGARDING THIS RUST PREVENTIVE period

5. December 22, 1938, the quartermaster supply officer by letter to the plaintiff terminated its right to deliver 1,500 gallons of rust preventive compound, representing the amount

rejected under test, and requested a "positive statement" within ten days whether plaintiff could make delivery of the remaining 2,004 gallons by January 23, 1939.

On January 9, 1939, the quartermaster supply officer by letter to the plaintiff terminated its right to deliver the remaining 2,004 gallons referred to in his termination letter of December 22, 1938, because of failure to make assurance of delivery by January 23, 1939.

The quartermaster supply officer also gave notice that the compound would be purchased elsewhere and the excess cost, if any, charged to the plaintiff.

6. The defendant purchased rust preventive compound elsewhere, at an excess cost of $1,182.91, being 3,504 gallons at 87.7 cents per gallon less 1%, as against 3,504 gallons at plaintiff's price of 53.6 cents per gallon, less 1%, and January 11, 1939, demanded of the plaintiff reimbursement of the excess cost of $1,182.91.

The plaintiff protested against the rejection and the repurchase, and refused to make the reimbursement demanded.

The rust preventive compound already delivered to the Benicia Arsenal was returned to the plaintiff.

7. On January 11, 1940, defendant purchased from plaintiff 216 cans of calcium hypochlorite under purchase order No. 4968 at the contract price of $233.09. This was delivered and accepted by the defendant. The purchase price thereof, however, was not paid plaintiff, but was offset against the amount claimed from the plaintiff by the defendant, as set forth in the foregoing finding. Plaintiff sues for this sum in case No. 45545.

8. On March 7, 1940, defendant purchased from plaintiff 5,000 drums of Cresol, Saponated Solution, at the price of $19,800. This material was delivered and accepted by defendant. The sum of $949.82 of the contract price thereof, however, was not paid to plaintiff, but was offset against the balance claimed to be due from plaintiff by defendant as set forth in the preceding finding. Plaintiff sues for this sum in case No. 45544.

9. The tests made at defendant's laboratory were in accordance with the contract specifications, and the results

fairly arrived at. The rejection of the compound and the termination of the contract was well-grounded in fact, fair, reasonable, and without prejudice.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On August 6, 1938, the defendant purchased from the plaintiff 3,504 gallons of rust preventive compound under purchase order M-280 (Case No. 45546). The compound was to be delivered to the Benicia Arsenal Wharf in California. Upon arrival it was subjected to tests to ascertain whether or not it complied with the specifications.

On November 14, 1938, the San Francisco laboratory of the National Bureau of Standards, United States Department of Commerce, reported to the commanding officer of the Benicia Arsenal that the compound did not comply with the specifications as to adhesion. Defendant's representatives accordingly notified plaintiff that the compound had been rejected and replacement thereof was demanded.

Plaintiff protested vigorously. It had a test made by a firm of Philadelphia chemists, who reported on November 26, 1938, that the compound satisfactorily stood the adhesion test. A firm of San Francisco chemists also reported that it satisfactorily stood the adhesion test. The San Francisco laboratory of the National Bureau of Standards then made other tests, one on December 1, 1938, another on December 20, 1938, and another on December 30, 1938. All tests by it showed that the compound did not meet the specifications as to adhesion. As a result thereof the materials delivered were rejected and plaintiff's right to deliver further amounts was terminated on January 9, 1939.

Prior thereto, on December 15, 1938, the plaintiff presented the controversy to the Chief of the Bureau of Ordnance in Washington. In reply that office notified plaintiff that a test would be made by the National Bureau of Standards in Washington, D. C. That test indicated that the compound satisfactorily complied with the specifications, and the commanding officer at Benicia Arsenal was so notified. The commanding officer replied, however, that all

tests by the San Francisco office of the Bureau of Standards had showed failure of the adhesion test, and said that he deemed it inadvisable to accept the material. On January 20, 1939, the Bureau of Ordnance replied, saying that a further test had been made by it and that this showed failure of adhesion. It, therefore, cancelled its recommendation for the acceptance of the compound.

In view of plaintiff's refusal to replace the defective material with satisfactory material, it was necessary for defendant to purchase other material on the open market. This it did at an excess cost of $1,182.91. This amount the defendant demands the right to collect from the plaintiff. In fact, the defendant has already deducted this amount from amounts due plaintiff under two other contracts, for which plaintiff sues in cases Nos. 45544 and 45545.

In case No. 45545, under purchase order No. 4968, the defendant purchased from plaintiff 216 cans of calcium hypochlorite at an agreed price of $233.09. This material was delivered and accepted, but the purchase price of it was applied against the above amount of $1,182.91, and has not been paid plaintiff. The balance of the $1,182.91 the defendant deducted from the amount due for 5,000 drums of cresol purchased from plaintiff under purchase order M-46993, case No. 45544.

The issue in all three cases, therefore, is whether or not the rust preventive compound was properly rejected as not complying with the specifications.

The purchase orders provided for inspection of the material and for the rejection of such material as did not comply with the specifications. After a number of tests the contracting officer decided that the materials did not comply with the specifications. The matter was presented to the Chief of the Bureau of Ordnance and while that Bureau at first recommended acceptance of the compound, it later cancelled this recommendation because further tests showed it did not comply with the specifications.

Paragraph 12 of the purchase order provided:

> Except as otherwise specifically provided in this Purchase Order, all disputes concerning questions of fact arising under this Purchase Order shall be decided by

> the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. * * *

Whether or not it did comply with the specifications is clearly a question of fact, and the parties to whom the settlement of this question was committed by the contracts have decided it against plaintiff. Plaintiff, therefore, is not entitled to recover in these cases. *Fleisher Engineering & Construction Co. et al.* v. *United States*, 98 C. Cls. 139, 155.

The petitions are dismissed. It is so ordered.

MADDEN, *Judge*; LITTELTON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRED R. COMB CO. v. THE UNITED STATES

[No. 45218. Decided February 5, 1945]

On the Proofs

Government contract; delay due to litigation concerning site of work.—Where plaintiff entered into a contract with the Government to construct certain buildings within a stipulated period of time; and where plaintiff was, after beginning operations, ordered by the defendant to suspend work on account of litigation concerning the site, to which the Government had not acquired title prior to letting the contract; and where plaintiff was put to extra expenses on account of the delay; it is *held* that plaintiff is entitled to recover, as for a breach of contract.

Same; failure to acquire title to site before letting contract; breach of contract.—It is a breach of contract for the other party to a contract, by negligence, to involve a contractor in the problems and delays of litigation about the site of the work.

Same; allowance of overhead for period of delay caused by negligence of Government.—Where contractor, by negligence of the defendant amounting to a breach of the contract, is delayed in the completion of the work; it is *held* that plaintiff is entitled to recover a proper proportion of main office overhead for the period of delay, without any precise proof of the amount by which plaintiff's overhead was ultimately increased by the delay. *Brand Investment Co.* v. *United States*, 102 C. Cls. 40, cited. *Coath & Goss* v. *United States*, 101 C. Cls. 702, distinguished.

The Reporter's statement of the case.

Mr. Bernard J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was on the brief.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is and at all times here involved has been a corporation duly organized and existing under the laws of the State of Minnesota, with its principal place of business at Minneapolis, Minnesota, and engaged in the work of building construction.

2. April 24, 1935, plaintiff entered into a contract with the defendant by which plaintiff agreed to construct certain buildings and facilities at La Creek Teal Migratory Waterfowl Refuge, in Bennett County, South Dakota, for the sum of $28,190, which contract and the specifications thereto attached are made a part of these findings by reference.

3. The contract provided that the work was to be completed within 150 calendar days after the date of receipt by plaintiff of notice to proceed. Plaintiff received notice to proceed on May 13, 1935, thus fixing the completion date as October 10, 1935. Plaintiff commenced work immediately after receipt of notice to proceed. Change orders issued by the defendant as the work progressed extended the completion date to October 31, 1935.

4. On July 29, 1935, while plaintiff was in the process of performing the work required by the contract, an injunction against further work was issued by the District Court of the United States at Deadwood, South Dakota, and the defendant directed plaintiff to suspend operations. The injunction was issued because the defendant had failed to secure adequate property rights in the land upon which the work was to be done. Plaintiff wrote to the defendant saying that it would expect to be compensated for losses caused by the delay. The defendant's representatives replied that the contracting officer had no authority to adjust the price to cover such damages and that any claim therefor should be submitted to the Comptroller General.

Thereafter, the injunction was removed and on September 7, forty days after the suspension of work on July 29, the defendant directed plaintiff to resume work. As a result of the suspension it took plaintiff 9 days to reorganize and resume work. If the suspension had not occurred, the work would have been completed before the onset of cold weather. Because of the suspension, the work extended into the winter months and on that account was slower in performance, and took 11 working days more than the number of actual working days that would have been required had the work been entirely performed during the period provided by the contract.

5. As a result of the suspension and the consequent delay, plaintiff incurred and paid the following costs, the facts of which are not disputed:

Item No.[1]:

Item	Amount
1 Cost of telegrams regarding preparations for suspension	$5.75
2 Cost of putting work in condition for suspension, and arranging for the storage of materials not permitted to be stored on the site:	
(a) Labor, July 30, 31 and August 1 and 2	47.80
(c) Hauling millwork to Martin, S. D.	4.00
(d) Receiving and storing materials	3.00
(e) Unloading two cars of sand and gravel at Merriman, Nebr., and stockpiling same away from the track	40.40
3 Increased cost of erection of steel lookout tower, erected on July 29 and dismantled on July 30	$38.40
Three men moved from Sand Lake to La Creek, charged for fares, $10.00 each	30.00
Two fares to Sand Lake job, $10.00 each	20.00
4 Increased cost of masonry work, transportation and traveling expenses of subcontractor	40.65
6 Cost of watchman during suspension	85.26
7 Reloading and hauling millwork	6.00
9 Expense of carpenter foreman and concrete foreman home and back to job	28.00
10 Expenses for Mr. Berg to his home at Minneapolis	15.00
Car expenses to job for Mr. Berg	15.00
Mr. Berg had to leave job Oct. 28, plaintiff had to send Mr. Lund from Minneapolis, car expenses to job	18.65

[1] The item numbers used in these findings are the same as those used by the parties throughout the record.

Item No.:

11 Expense due to work being deferred into cold weather, making costs 20% higher than they would have been, for exterior masonry:

(d) Additional cost painting and glazing work	40.00
(g) Temporary heat: Fuel and hauling	38.97
Total	476.88

6. In addition to the agreed items listed in finding 5, plaintiff claims compensation for the following items, which are disputed by the defendant:

Item 2 (b). Plaintiff claims $10.00 as depreciation on tarpaulins used to cover lumber during the suspension of the work. Eight tarpaulins were used in connection with the work, but their use in connection with the suspension of the work and the amount of depreciation, if any, are not proved.

Item 2 (f). Plaintiff claims that for the purpose of arranging for storage of material, necessitated by the suspension, plaintiff's superintendent made two trips by automobile from the site of the work to Martin, South Dakota, and two trips to Merriman, Nebraska, at an expense of 5 cents per mile for an aggregate of 130 miles.

July 29 and 30, 1935, plaintiff's superintendent made two trips from the site of the work to Martin, South Dakota, a total distance of 50 miles, and plaintiff allowed him 5 cents per mile therefor, but it is not proved that the trips related to the suspension. It is not proved that plaintiff's superintendent made the claimed trips to Merriman, Nebraska.

Item 5. Plaintiff claims that its plumbing subcontractor had five men at work on the job, who by reason of the suspension had to be taken to other work by the subcontractor and returned to the job when the suspension was terminated; that plaintiff is obligated to reimburse the plumbing subcontractor for $62.50, the expense of such travel. The facts with reference to this claim are not proved.

Item 6. When the work was suspended a watchman became necessary to protect the work already performed and materials on hand at the site. Plaintiff employed and paid a watchman the sum of $96.46 for services from the time of the suspension to September 15, 1935. Eleven dollars and twenty

cents of this sum represents the amount paid to him for services from September 9 to September 15.

Notice to resume work was received by plaintiff Saturday, September 7, and the defendant admits that the suspension was responsible for employment of the watchman up to Monday, September 9. Plaintiff's work had been disorganized by the suspension so that it took until the 15th of September to get workmen back on the job and to resume the work. The necessity for a watchman from September 9 to September 15 was a result of the suspension of the work.

Items 7 (b) and 7 (c). Because of the suspension, certain millwork was stored at Martin, South Dakota, and had to be hauled to the site and checked after the work was resumed. The cost of hauling is not disputed (finding 5). In addition, plaintiff claims that $4.95 was paid as wages to two men for checking the material delivered. The payment of this amount for the purpose claimed is not proved.

Item 8. Plaintiff claims that stock piles of sand and gravel at the railroad right-of-way were obliged to remain there for a period of 40 days because of the suspension and that, as a result, 14,410 pounds thereof were lost by reason of being beaten into the earth by traffic. The amount of $16.20 is claimed as the value of the sand and gravel. The fact of the loss and its extent, if any, are not proved.

Items 9 (a) and 9 (b). At the beginning of the work plaintiff engaged two key workmen and assured them that they would be employed for four or five months. The work was suspended after they had worked approximately five weeks. Plaintiff paid them $56.60 for the expense of their transportation back to their homes. Twenty-eight dollars of this amount is not disputed by defendant (finding 5).

In addition, plaintiff claims that it owes $51.20 to the two workmen for time lost in traveling, computed at the rate of $6.40 per day for four days each. There is no proof as to the place these workmen lived or of any other fact from which it can be determined whether the amount of time required for traveling was reasonable. There is no proof of the terms of the agreements under which the workmen were employed except that plaintiff considers its obligation to the workmen a moral obligation.

Items 10 (b), 10 (c), 10 (e), and 10 (f). Among the workmen who were employed with the understanding that the work would last for approximately 5 months, was Superintendent William Berg. Plaintiff paid Berg for his expense in returning home to Minneapolis after the suspension and his expense in returning from Minneapolis to the site of the work upon resumption of the work. These payments are not disputed (finding 5). In addition, plaintiff claims that it is obligated to pay Berg $20.00 for time lost traveling and $12.00 for meals en route. No facts are proved from which it can be determined whether plaintiff obligated itself to pay the two last-named amounts to Berg, except that it appears that plaintiff feels obligated to pay, and will pay Berg these amounts only in the event it recovers such amounts from the defendant.

Items 10 (h) and 10 (i). When it was assumed that the work would be completed on or before October 10, Berg had made a commitment to work for another contractor after that date and was obliged to leave before the plaintiff's work was completed. C. C. Lund was brought from Minneapolis to fill Berg's place and the expense of his travel was paid by plaintiff. The amount of this expense is not in dispute (finding 5). In addition, plaintiff claims that it owes Lund $20.00 for two days' time lost in traveling and $6.00 for meals and lodging en route. There is no proof of the agreement under which Lund took his employment and traveled to the site.

Item 10 (j). In arranging to relieve Berg it was necessary for the plaintiff to send a telegram to him at a cost of $1.58. This expense would not have been incurred except for the suspension of the work.

Item 11 (a). Had it not been for the suspension, the work would have been completed before cold weather. On July first, four weeks before the suspension, at a time when the date for completion was fixed as October 31, plaintiff entered into a subcontract with Phil S. Ablen, of Omaha, Nebraska, by which Ablen agreed to perform the masonry work required by plaintiff's contract with defendant. Plaintiff's contract with defendant was made a part of the subcontract by reference. Ablen entered into the performance of the masonry work, but because of the suspension which threw the

work into the cold weather, plaintiff was obliged to relieve Ablen of part of the work he had agreed to perform and, in addition to paying Ablen the subcontract price, plaintiff had to perform certain of the masonry work at an expense of labor of $177.60, which expense would not have been incurred had it not been for the suspension of the work.

Item 11 (b). The suspension delayed most of the concrete work until the freezing winter weather, which came after the time the work would have been completed had the suspension not intervened. Because of the cold weather plaintiff was obliged to heat materials and to cover and protect the work against freezing, all of which would not have been required had the work been completed before the arrival of cold weather. The exact additional cost of doing the work in cold weather and of protecting the concrete against freezing is incapable of determination, but a reasonable estimate of the increased cost is $102.87.

Items 11 (c-1) and 11 (c-2). Because of the suspension, the work of plastering was delayed until the weather became freezing and, in order to protect the plaster from freezing, plaintiff was obliged to close door and window openings with muslin and paper at an expense of $3.15 for materials and $31.00 for labor, which expense would not have been incurred except for the suspension.

Item 11 (e). Because of the suspension, a large part of the carpentry work was delayed until the weather became cold. Performance of this work in cold weather resulted in an additional cost of $148.30, which would not have been incurred except for the suspension.

Item 11 (f). Because of the suspension, installation of steel sash and overhead openings and caulking of window and door openings were delayed until the weather became cold. Performance of this work in cold weather resulted in an additional cost of $23.11, which would not have been incurred except for the suspension.

Item 11 (g 1). Plaintiff claims an estimated sum of $25.00 as the cost of labor for providing heat during cold weather. Such heat would not have been required had the work not been delayed by the suspension. Plaintiff's workmen spent some time in firing the heating equipment, but no facts are

proved from which it can be determined whether or not plaintiff's estimate of $25.00 is reasonable.

Item 12. During the suspension there was a depreciation in the value of plaintiff's equipment used on the job, but the extent thereof is not proved. There was also an insurance cost for the period the work was suspended, but the amount of such cost is not proved. There was some increase in field overhead by reason of the delay, but the proof does not show the amount of the increase.

Item 13. During the year 1935 plaintiff's actual office overhead expense was $13,487.17. Plaintiff received for all work done during that year an aggregate of $182,305.47. The amount received for the work here involved was $29,023.67.

Because of the suspension, plaintiff claims $357.00 as increased office overhead on the work here involved based on the following computations:

The amount received for the job is approximately 16% of the aggregate amount received for all work during the year 1935. By taking 16% of the total overhead plaintiff arrives at $2,140.00 as the amount of overhead chargeable to this job. Plaintiff divides the $2,140.00 by 12 to obtain $178.50 as the monthly office overhead applicable to the job here involved.[2] Plaintiff doubles this amount, arriving at the sum of $357.00, which it asserts is the extra overhead for two months' delay.

7. January 17, 1936, plaintiff submitted a claim for $1,657.09 covering the items specified in findings 5 and 6, to Thomas E. Jacoby, Assistant Chief, Bureau of Biological Survey, Department of Agriculture, on the ground that such items constituted damages resulting from the order suspending work on July 29, 1936. By letter dated February 5, the Bureau replied that no authority had been granted by the contract to adjust the contract price because of damages which might have been suffered on account of the suspension, and that the claim should be presented to the Comptroller General. Under date of March 26, 1936, plaintiff appealed in writing to the head of the Department of Agriculture, asking for a decision in the matter. By letter

[2] The difference in basic amounts and minor inaccuracies in plaintiff's computations are so slight as to be immaterial.

dated May 11, 1936, the Acting Secretary of the Department of Agriculture held that there was no authority under the contract for an adjustment on the ground asserted and that the claim should be presented to the Comptroller General. Thereafter the claim was duly presented to the Comptroller General and was disallowed by him.

8. Including the total of $476.88, carried from finding 5, the following is a summary of those items of the plaintiff's claim which have been adequately proved to have resulted from the delay caused by the suspension of work in obedience to the injunction:

Item	Amount
1. Items set out in finding 5	$476.88
2. Amount paid to watchman from Sept. 9 to Sept. 15, 1935 (Item 6, finding 6)	11.20
3. Additional amount paid to certain workmen for travel (Item 9 (a), finding 6)	28.60
4. Telegram (Item 10 (j), finding 6)	1.58
5. Additional expense in connection with masonry work (Item 11 (a), finding 6)	177.60
6. Additional expense in connection concrete work (Item 11 (b), finding 6)	102.87
7. Additional expense in connection with plastering (Items 11 (c-1), 11 (c-2), finding 6)	34.15
8. Additional expense in connection with carpentry work (Item 11 (e), finding 6)	148.30
9. Additional expense in connection with windows and doors (Item 11 (f), finding 6)	23.11
10. Proportion of main office overhead (Item 13, finding 6)	357.00
Total	$1,361.29

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

In April 1935, the plaintiff made a contract to build for the Government certain buildings and facilities in South Dakota. The plaintiff started the work, but on July 29, 1935, was ordered by the Government to suspend operations because a Federal District Court had enjoined the continuance of the work for the reason that the Government had "failed to secure adequate property rights in the land upon which the work was to be done." After forty days the plaintiff was given permission to proceed with the work. It then

took the plaintiff nine days to reorganize the work and resume it. The interruption carried the work into the winter months when progress was slower, and it took eleven more days of actual working time to complete the work than it would have taken but for the interruption.

The Government offered no explanation of how it happened that it let the contract and caused the plaintiff to start work without having first obtained the title to the site. Unexplained, we must attribute the situation to negligence on the part of the Government. It is a breach of contract for the owner to negligently involve a contractor in the problems and delays of a litigation about the site of the work.

As to the amount of the damage which the plaintiff suffered, we have summarized the items in finding 8. The Government vigorously contests our allowance of a sum for main office overhead.

The report made in this case by a commissioner of this court contained a finding that it was not proved that any additional office overhead cost was incurred by reason of the suspension of the contract work and the delay in completion resulting therefrom. We have not included that finding, because we think it is immaterial. It would not be expected that a contractor would enlarge his main office staff and facilities at a time when one of his jobs was merely marking time. But unless his office was understaffed before the suspension, it too would, *pro tanto*, mark time during the suspension, unless the useful work which it would have been doing in regard to this job, if the job had not been suspended, had been replaced by extra work made necessary by the suspension. So the fact that no extra help was hired seems both natural and immaterial. If some employees had been laid off, that would have been material, since it would have enabled the contractor to pay the full staff which he would need during the extra time that the work was in process, because of the delay, with the money he had saved by laying off employees during the period of suspension.

But it is, ordinarily, not practicable to lay off main office employees during a short and indefinite period of delay such as occurred here. So the contractor, instead of saving

the salary of that proportion of his main office staff which is attributable to this contract, is obliged, in effect, to waste it, and to spend a similar amount at the end of the contract for the extra time made necessary by the delay. This waste is caused by the breach of contract, and it ought to be paid for by the party guilty of the breach.

We suppose that a contractor with certain facilities bids on new work when the completion of his present work approaches, and his facilities are about to become available. If, as in this case, the delay which postpones the completion of existing work occurs at the very beginning of that work it would be an invitation to the merest guess work to require the contractor to give evidence as to what he would have done next after this work was completed, if it had been completed at an earlier time when he knew it would not be completed. We think that the absence of this untrustworthy and speculative kind of evidence gives us no reason to suppose that a contractor's equipment and organization remains, *pro tanto*, idle for an indefinite period after the completion of each job. We think that the Government, having breached its contract, has no right to say, in effect, that its breach shall go uncompensated unless the contractor proves, with precision, what is usually not susceptible of such proof. *Brand Investment Co.* v. *United States*, No. 44617, 102 C. Cls. 40. The Government urges that this conclusion in the *Brand* case was not consistent with that of the court in *Coath & Goss* v. *United States*, 101 C. Cls. 702. In the latter case there was delay in furnishing the architect's drawings and models for certain portions of the work. These portions of the work were delayed, but the work was not entirely stopped, nor was its completion delayed by these delays in portions of it. In those circumstances it would have been difficult to attribute any part of the main office overhead to the defendant's breach of contract and we did not do so.

The plaintiff may recover $1,361.29. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ROSS ENGINEERING COMPANY, INC., A CORPORATION, v. THE UNITED STATES

[No. 45198. Decided February 5, 1945. Plaintiff's motion for new trial overruled May 7, 1945]*

On the Proofs

Government contract; misrepresentation; contractor's knowledge of conditions.—Where it is found from the evidence that when its bid for the construction of an Army barracks was submitted plaintiff knew all of the relevant facts concerning conditions at the site; it is *held* that plaintiff, not having been misled, is not entitled to recover damages on the basis of misrepresentation.

Same; Government did not warrant dates of completion of foundations.—In the contract in suit, the Government did not, by the addendum to its specifications, warrant to the plaintiff, the successful bidder, that the foundations would be ready by the specified dates, where the plaintiff, when making its bid knew they would not be ready; and there was no breach of the contract, for which the plaintiff might recover, when the foundations were not completed on the dates specified, and plaintiff was, at its request, given additional time because of the delay.

Same; plaintiff entered into contract with full knowledge of facts.—Where, after the plaintiff had, admittedly, full knowledge of the facts, it materially changed the offer contained in its bid, by reducing the number of days in which it would agree to complete the work; and where plaintiff's real and final offer, which was accepted and became the basis of the contract, was thus made with complete knowledge; it is *held* that thereupon the specifications for the completion of the foundations passed completely outside the contemplation of the contract, and the fact that the foundations were not ready on the dates originally specified did not constitute a breach of the contract by the defendant, and the plaintiff is not entitled to recover.

Same.—Where, even if contractor did not have complete knowledge of the facts at the time its bid was submitted but did have complete knowledge before bid was accepted and contract was signed; there can be no recovery on the ground of misrepresentation of conditions by the defendant.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

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*Plaintiff's petition for writ of certiorari denied.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of Delaware and has its principal office in Washington, D. C. Mr. Herbert Bright, who lives in Washington, D. C., is its Secretary and Treasurer and was in charge of its affairs insofar as the transactions involved in this case were concerned.

2. In 1938, the defendant began the construction of a building at Fort Niagara, New York, to be used as an Army barracks for 250 men. The building was to have two full stories plus a lesser or part story, sometimes called a third story. It was to consist of a "north wing" and a "south wing" with a "bay" connecting the two wings. The defendant, with the use of WPA labor, was to clear the site and construct the concrete foundations, and the construction of the building was to be let to a contractor by competitive bidding. Reinforced concrete was to be used for the framework and floor slabs. The walls were to be of brick. The invitation for bids dated August 15, 1938, that went out to prospective bidders, contained, *inter alia*, addendum No. 1 to the specifications, which provided in part as follows:

> The work of excavating foundation and constructing footings for all columns and interior brick walls, and constructing exterior walls, area walls, and area stairs as indicated on Plan No. 6491-140 (See General Note), No. 6491-141, 6491-142, and 6491-143, where applicable to the above listed work will be completed by the Constructing Quartermaster, Fort Niagara, N. Y., insofar as called for on the plans as follows:
>
> (*a*) The foundation of the North wing to "CJ" between footings, numbered 25 and 30 and 27 and 28, Foundation Plan and Detail (Plan No. 6491-140) of barracks for 250 men will be completed and site cleared so that the successful bidder can start work September 5, 1938, without interference.
>
> (*b*) The foundation of the connecting bay (main building) from "CJ" between footings numbered 25 and 30 and 27 and 28 to "CJ" between footings numbered 49 and 54 and 51 and 52 will be completed and cleared on or before September 20, 1938.
>
> (*c*) The foundation of the south wing will be completed and cleared on or before September 30, 1938.

The letters "CJ" meant construction joint.

3. Plaintiff filed a bid, dated August 29, 1938, of $203,400 (the amount of $500 to be deducted if the foundation drainage should be omitted) to be open for acceptance for a period of 10 days, and the work to be commenced within 15 days and completed within 550 calendar days after receipt of notice to proceed.

4. In originally figuring the amount his company should bid, Bright proceeded on the theory that if the foundations were completed and cleared on the dates stated in Addendum No. 1, his company could begin the construction of the forms for the concrete during September 1938, and that as to the first floor it could work the north wing first, the bay second and the south wing third, the pouring of the concrete being practically one continuous operation which could be completed about October 10, 1938, or very shortly thereafter. This contemplated the possible removal of the form lumber and materials from the north wing after the concrete had set and their use again on the south wing, and the use of additional form lumber and materials for the bay. He also thought that before the setting in of cold and bad weather, which he knew from past experience in the territory would be about the middle of December, his company could complete all the concrete work of the entire frame and floor slabs and, by running up the brick walls, could enclose the north half of the building and thus be able to do a large amount of the inside work during the winter months. Such theory was practical and could have been accomplished by plaintiff if the defendant had completed the foundations at the dates stated in Addendum No. 1.

Whether the figure arrived at by Bright in making his computation on the basis outlined in the preceding paragraph was the figure written into plaintiff's bid is not proved.

5. The bids were opened at Fort Niagara at 10:00 a. m., on August 30, 1938. On August 29, 1938, Mr. Kurtz, an engineer in the employ of plaintiff in whom Mr. Bright placed great confidence, went to the site for the purpose of calling Bright, by telephone, and getting from Bright his last minute figure to write into the bid which Kurtz would present just before the hour set for the opening. He also went, presumably, for the purpose of examining the site.

as bidders were admonished to do in the invitation for bids. He learned that the foundations for the building could not be completed and cleared by defendant by the dates stated in Addendum No. 1. On August 30, 1938, he called Bright, told him that the foundations would not be ready to receive the superstructure for two or three or four months, and was given by Bright the figure to write into the bid form. He also told Bright, either in this conversation or the other one which occurred shortly after the bids were opened, and referred to hereinafter, that the reasons why the completion of the foundations would be delayed were that the workmen had run into an underground spring, and that the supervisors could not work the WPA labor more than a limited number of hours per week. Later that day he attended the opening of the bids, ascertained that plaintiff was the lowest bidder, and again called Bright at Washington and told him that plaintiff's was the lowest money bid by some $300 but that plaintiff's time for completion and time within which to commence work, after award of the contract, as set in its bid,.were not the lowest, nor was the time during which its bid was to remain open for acceptance as long as that set by one other bidder.

6. On September 1, 1938, Bright engaged in a conversation with a Captain Violante at Washington, D. C., who expressed the belief that 550 days for performance of the job was too long and the wish that Bright should write a letter reducing the time to 300 days. Bright, on that same day, wrote, in the name of the plaintiff, a letter addressed to the "Constructing Quartermaster, Room 2334, Munitions Building, Washington, D. C., Att: Captain Violante," as follows:

> Re: One (1) 250 Men's Barracks, Fort Niagara, New York.
>
> In the preparation of our estimate for the subject project, we could not authoritatively determine the weather conditions which might be encountered during the course of construction. Having had some experience with the early and severe winters in the vicinity of Fort Niagara, we were prompted to protect our proposal by the specification of 550 days as the time which would be required for completion.
>
> It is not our intent, however, to unduly delay the start or the progress of the job in any manner whatsoever,

especially in view of the fact that it is decidedly to our advantage to work towards an early completion.

In all our government work we have never finished later than the time allotted, in fact, we have always made it a practice to complete our work ahead of schedule; a record which we mean to make every effort to maintain on this project.

We ask, therefore, that you accept this as your authority to reduce the number of days required for the completion of this project to three hundred (300).

You may be assured that our only desire is to effect a most satisfactory relationship between the Contracting Officer and ourselves.

At the time Mr. Bright wrote this letter he knew that plaintiff's bid was the lowest money bid, but that there were other bids that were lower in number of days required for performance and more favorable to the Government in regard to the time work would be commenced after the award of the contract, and the time the bid would remain open for acceptance. At the time this letter was written plaintiff's bid had not been accepted and plaintiff had not been awarded the contract.

7. On September 3, 1938, Captain B. E. McKeever, who signed as "Constructing Quartermaster", sent a telegram from Fort Niagara to plaintiff at Washington, D. C., advising plaintiff that the Quartermaster General had accepted plaintiff's bid (the $500 to be deducted for the omission of foundation drainage), requesting immediate acknowledgment of receipt of the telegram as notice of the award and stating that time of commencement and completion of work would be based upon the date of receipt of the notice. On the same day Captain McKeever wrote plaintiff a letter to the same effect as the telegram, and plaintiff acknowledged receipt of the telegram on September 6, 1938, its office having been closed on September 5, 1938.

8. The formal contract for the construction of the building for the consideration of $202,900 was dated September 3, 1938, and was executed in the name of the United States by A. Owen Seaman as the contracting officer. Captain McKeever, as constructing quartermaster, executed the certificate as to plaintiff's execution of the contract. The contract provided that the work should be commenced within 15 cal-

endar days and should be completed within 300 calendar days after receipt of notice to proceed, to wit, on or before July 3, 1939. It contained the usual provisions for liquidated damages, the rate being $50 per each calendar day of delay in completion of the work. The contract was given the number W 6491 qm-4, O.I. No. 2. It and its attachments were filed in evidence as plaintiff's exhibit 1, which is by reference made a part hereof.

9. Since Bright knew that the foundations would not be ready on the dates specified in Addendum No. 1, he did not sublet the concrete work until September 18, 1938, when he made a verbal contract, confirmed by a written contract on September 20, 1938, with K. L. Mertz & Co. (hereinafter called "Mertz") to furnish the materials and do the concrete work for the sum of $41,030, plaintiff, however, to furnish the reinforcing steel. Mertz had originally (on September 15, 1938) proposed a price of $45,000 for the work, as he did not then know that the defendant would be late in completing the foundations and thought that he would have to purchase enough form lumber and materials to construct forms for the bay and both wings of the first floor at the same time. The reduction represented the saving in the cost of form lumber which Mertz hoped to accomplish because of the delay in the completion of the foundations.

10. The foundation of the north wing was substantially completed and cleared by the defendant on September 20, 1938, and Mertz went on the job on either September 21 or 23, 1938, and, his preliminary work having been done, began constructing the forms for the concrete on or about September 26 or 27, 1938. On or about October 15, 1938, or possibly a few days prior thereto, the foundation of the bay was completed and cleared, and by November 1, 1938, Mertz had built the forms for the first floor of all of the north wing and the north half of the bay. He poured these, with the exception of a small area of the bay in which he had not been able to place certain conduits that were necessary, on November 1, 2, and 3, 1938. In the meantime, on October 26, 1938, plaintiff wrote a letter to the Constructing Quartermaster, United States Army, Munitions Building, Washington, D. C., calling attention to Addendum No. 1, the delay in

completing the foundations which prevented plaintiff from working on the entire building at the same time, and the reduction of the number of days for completion from 550 to 300, and then stating as follows:

> However, we ask that you record this letter as our application for additional time, due to the slow progress of your forces to complete the foundation, and thereby allow us to construct this building in its entirety in lieu of one-half of the time.
>
> Further in this connection, we ask to be compensated with the additional cost brought about due to the fact that we cannot throw our forces on the entire structure. This handicap will increase our overhead as well as general construction costs.

The letter made no mention of weather conditions.

11. There was a delay that occurred in October 1938 due to the fact that although the plans and specifications did not call for reinforcing steel in the concrete water table (plaintiff's exhibit 1, plan 621–1406) constituting a small part of the work plaintiff was to do under the contract, the defendant demanded that the reinforcing steel be installed. Plaintiff, as promptly as it could do so, purchased and installed the steel under a change order and was allowed compensation therefor in the amount of $294.74, and an extension of 15 days in the contract time.

12. On November 4, 1938, the day after Mertz finished the pouring mentioned in finding 10, the defendant made its last pour of the foundation of the south wing and that foundation was completed and cleared within a week or ten days thereafter.

13. About November 1, 1938, plaintiff, although it then had no grounds for thinking that it could accomplish its original intention of completing the concrete work and enclosing the north half of the building prior to the expected setting in of cold weather about December 15, 1938, demanded of Mertz that he purchase enough form lumber and materials to build the forms for the south wing and the south half of the bay, so as to avoid the delay incident to the removal and reuse of the form lumber and materials then in place in the north wing and north half of the bay. This Mertz refused to do, whereupon plaintiff bought the lumber and materials, at a

price of from $3,000 to $3,500, and a dispute, not detailed in the testimony, took place between plaintiff and Mertz. Mertz, however, remained on the job and continued with the construction of forms on the south half of the bay, and also on the south wing as soon as it had been completed and cleared. However, he abandoned his contract and left the job about the middle of December 1938, at which time the first floor concrete work was complete and a small start had been made on the second floor. Plaintiff itself then completed the concrete work, using Mertz' former employees to do it.

Beginning about December 15, 1938, the weather got so cold that plaintiff had to richen the mixture of the concrete by using a larger proportion of cement and purchase tarpaulins and place them on wooden frames built over the concrete as it was poured and by the use of heat produced by salamanders, coal, coke and oil, keep the concrete warm so that it would set and harden without freezing. This slowed down the work and made it more expensive. Delays and lost time also resulted from the icy condition of the roads over which materials had to be hauled to the job. Plaintiff continued doing the concrete work during the winter months and the following spring, and ultimately completed the contract within the contract time period, as extended by the defendant. Plaintiff was, by check dated September 16, 1939, paid the contract price, plus extras, the final invoice having been submitted on or about September 1, 1939. The delay of the defendant in completing the foundations may have prevented plaintiff from finishing all the concrete work before the cold weather set in about December 15, 1938. It cost plaintiff more to do the concrete work during the winter months than it would have cost it to do such work prior to December 15, 1938.

14. On December 16, 1938, plaintiff wrote a letter to Captain McKeever, Constructing Quartermaster, Fort Niagara, N. Y., as follows:

> Reference is made to the matter which we have heretofore discussed informally with you, namely our request for an extension of our contract time to balance the Government's delay in completing and turning over to us the foundations for the above building.

In Addendum No. 1 of the specifications dated August 15, 1938, issued by the Constructing Quartermaster, Fort Niagara, New York, it was indicated that all the foundations for the building would be completed and cleared on or before September 30, 1938.

Our contract was dated September 3, 1938, and we were given notice to proceed on September 6, 1938. Upon receiving notice to proceed, however, we found that the foundations were not then ready. Indeed, the foundations of the North Wing, which it was indicated in Addendum No. 1 would be ready "so that the successful bidder can start work on September 5, 1938, without interference" were not finished until on or about September 20, 1938. The foundations of the connecting bay (main building) which it was stated would be "completed and cleared on or about September 20, 1938" were not in fact completed until on or about October 15, 1938. And the foundations of the South Wing which it was stated "will be completed and cleared on or before September 30, 1938" were not in fact completed until on or about November 30, 1938.

In preparing our bid we naturally relied upon the representations made in Addendum No. 1, and our offer to build the building reflects the anticipated delivery of the completed foundations to us by September 30, 1938. Having been obliged to proceed with a portion of the building at a time our costs have been considerably increased and of course a portion of our contract time has been consumed by the delay in connection with the foundations.

Will you not at this time kindly give consideration to the situation outlined above and make suitable adjustment? We feel that our contract time should be extended sixty days in view of the delay of that length of time in furnishing us with the completed foundations.

This letter was sent to the Quartermaster General by the constructing quartermaster with an erroneous report to the effect that the defendant had completed and cleared the foundations to the north wing, the bay, and the south wing, on September 13, 1938, September 30, 1938, and November 4, 1938, respectively. As a result of the erroneous report, plaintiff was advised by letter that an investigation had disclosed that work on the project as a whole was delayed only 35 days because of the late completion of the foundations and that if plaintiff would put in a request for an extension of 35 days in the contract period time the extension would be

allowed. Plaintiff put in such a request for an extension of 35 days and it was allowed. This latter correspondence did not involve anything except a mere extension of the contract period time of performance. It did not purport to deal with any claim by plaintiff for damages for breach of contract to complete the foundations on the dates stated in Addendum No. 1, and it made no mention or reference to the letter plaintiff wrote on October 26, 1938, with reference to additional compensation, quoted in finding 10. Receipt of that letter was never acknowledged by the Government.

15. The additional costs and expenses to plaintiff that resulted from the doing of the concrete work during the cold weather between December 15, 1938, and March 31, 1939, inclusive, were as follows:

Tarpaulins $244.25, and salamanders $494.61, for protection of concrete from frost	$738.86
Heating concrete	124.68
Extra cement in concrete	439.56
Removal of snow	251.78
Labor on winter protection	1,188.76
Additional cost of labor for concrete and form work during cold weather	7,739.46
Overhead for 35 days' delay	111.26
Total	10,594.36

Claims of other items of damage, asserted by plaintiff, are not proved.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, Ross Engineering Company, constructed a 250-man barracks for the Government at Fort Niagara, New York. It now sues the Government for damages for breach of contract, the alleged breach being the failure of the Government to complete and turn over to the plaintiff, on the dates specified in the contract papers, the foundations upon which the plaintiff was to build the superstructure of the barracks. The plaintiff claims that because of this delay it was forced to carry on during the winter months work which it could have, but for the delay, completed before

winter, and that the winter work required the use of more materials and the expenditure of more money for labor than would have been required if the work had been done before winter.

The Government, on August 15, 1938, issued its invitation for bids on the job. The invitation included the specifications for the proposed building, and, in Addendum No. 1, to the specifications, which addendum is quoted in finding 2, it stated that the Government would complete the foundations and clear the site of the north wing by September 5, of the connecting bay by September 20, and of the south wing by September 30.

The plaintiff's executive, Bright, in working up the figures for the plaintiff's bid on the job, supposed that these statements of the Government about the dates of completion of the foundations would be fulfilled, and that the concrete work which the contractor would have to do could be begun and carried forward rapidly and economically, the brick walls of the north wing of the building could be built, and the winter months could be devoted to inside work in that wing.

Bright sent Kurtz, an engineer employed by the plaintiff, to the site of the work. He arrived there on August 29, the day before the bids were to be opened. Bright testified, in regard to him:

> He has been with me about two and one half years, and I am sure he knows how my mind travels, and I how his travels. * * * He was very close to and familiar with my work in bidding and everything else * * *.

Bright also testified:

> No; he was up there to get my bid. We like to have as much time as possible before opening the subbids and everything else. So, in order to avoid complications, and so forth, we thought we would send Kurtz up there, and he would call me, and I would give him the figure and he would give it to Captain McKeever.

Before ten o'clock on the morning of August 30th Kurtz presented the plaintiff's bid of $202,900, presumably on the form executed by Bright at Washington, D. C., the plaintiff's home office, with the figure not filled in, and carried by Kurtz

to Fort Niagara. Kurtz must, therefore, have called Bright before he filled in the figure and handed in the bid. The bids were opened at ten o'clock. Kurtz immediately thereafter called Bright again and told him that the plaintiff was the low bidder, but only about $300 low. In one of these conversations Kurtz told Bright that the Government had encountered difficulties in its work on the foundations; that it had encountered an underground spring; that it was using WPA labor which it could work only a limited number of hours per week; and that the foundations would not be ready "for probably two or three or four months."

From the time of this conversation Bright had no expectation or hope of the foundations being ready at or anywhere near the times stated in the invitation for bids. In fact, as shown in findings 10 and 12, the three foundations were completed and the sites cleared 15, 27, and 40 days, respectively, after the dates given in the invitation, and therefore much sooner than Kurtz had predicted. From the time of this conversation Bright acted upon his knowledge that the foundations would not be completed on time, and made all his arrangements accordingly.

Bright testified that Kurtz told him that the foundations would be late when he called him to tell him that the plaintiff was the low bidder. He did not testify directly at all as to his other conversation with Kurtz, before ten o'clock the same day or perhaps the day before. We have found, as we must, that that conversation occurred, because Kurtz was sent there, as Bright testified, to "call me, and I would give him the figure and he would give it to Captain McKeever." Bright's testimony that the information about the foundations came to him after the bids were in was not pointed, nor was he cross-examined on the point. We can only conclude that his testimony that the information came to him in the conversation after the opening was an inadvertence. We cannot believe that Kurtz, an engineer employee of the kind described by Bright in his testimony, would have gone to the site of the work on which the plaintiff intended to bid, and called Bright to get the figure to insert in the bid without telling him, before putting in the plaintiff's bid, a fact of great importance in relation to the

amount of the bid. In answer to plaintiff's counsel's questions, Bright testified:

> Q. Could he tell by looking at the site whether the foundations were ready?
> A. Oh, surely.
> Q. You said he was an engineer?
> A. Yes.

We have concluded, therefore, that when Bright gave Kurtz over the telephone the figure to write into the plaintiff's bid, Bright knew the facts, and his expectations for the future were considerably gloomier than the events ultimately warranted. If he did not increase his bid correspondingly it would seem to have been because he did not count so heavily upon the prompt completion of the foundations as he now says that he did. If, as we have found, the plaintiff's bid was submitted when the plaintiff knew all of the relevant facts, it cannot, of course, complain that it was misled to its damage, because it was not misled at all. Legal doctrines relating to misrepresentation have, therefore, no application. The only possible basis for recovery would be that the Government, by the addendum to the specifications, was offering to warrant to the successful bidder that the foundations would be ready by the specified dates although the bidder knew perfectly well that they would not be and had no expectation or hope that they would be. The Government would, thus, be inviting bids on a construction job plus a lawsuit. This would be a legally possible, though a most extraordinary, transaction, between private persons. Even if it would be legally possible for the Government to enter into such a transaction, we have no indication that either party here had any intent to do so.

Our inference that the plaintiff knew the facts when it submitted its bid is fortified by the fact that, if it did not know them then, it learned them shortly thereafter, yet made no sort of protest or objection to its plight. Kurtz said nothing to the officers at Fort Niagara. Bright, in Washington, was called by Major Violante and told that the time, 550 days, which the plaintiff had specified in its bid as the time required for completion was too long to suit the Government, and was asked to reduce the time to 300 days.

Bright, making no mention of any disappointment about the time of completion of the foundations, agreed to reduce the time to 300 days and wrote the letter quoted in finding 6. We hardly think it is possible that one who had been seriously misled would have failed to utter even a mild protest. Its letter of October 26, quoted in finding 10, is much too late to constitute a complaint *recenti facto*. Its letter of December 16, quoted in finding 14, contains the untrue statement that:

> Our contract was dated September 3, 1938, and we were given notice to proceed on September 6, 1938. Upon receiving notice to proceed, however, we found that the foundations were not then ready.

It is possible that we are wrong in our finding that the plaintiff knew, when it put in its bid, that the foundations would not be completed on time. But the result is not changed by shifting the time when Bright learned the facts about the foundations from before the opening of the bids to shortly thereafter. The bid was still, at that time, only an offer. If it was, as we are now assuming, induced by a serious misrepresentation of material facts, the plaintiff could have withdrawn it with impunity, and could have thus completely escaped damage. If the plaintiff had asked to be allowed to withdraw its bid, and had been threatened with the penalty on its bid bond, a different question might be presented. But it did not ask, or desire, so far as appears, to withdraw its bid. It will be remembered that its bid was only $300 low, so any increase that it might have asked to be allowed to make, on account of its being misled, would have kept it from being the low bidder.

After the plaintiff had, admittedly, full knowledge of the facts, it materially changed the offer contained in its bid, by reducing the number of days in which it would agree to complete the work from 550 to 300 days. Thus its real and final offer, and the one which was accepted and set the terms of the contract, was made by the plaintiff with complete knowledge of the facts here complained of. Thereupon the dates set in the specifications for the completion of the foundations passed completely outside the contemplation of the contract. Neither party, when the plaintiff's modified offer was made,

and accepted by the Government, had any expectation that the foundations would be ready on those dates. Their not being ready was, therefore, no breach of the contract.

The petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF JACOB PIERCE, DECEASED CREEK, ROLL #3074, v. THE UNITED STATES

[No. 45348. Decided May 7, 1945]

On Motions for New Trial

Estate tax; inclusion within gross estate of land allotted to full-blood Creek Indian and transferred by death.—In a suit by plaintiff, as the superintendent of the Five Civilized Tribes of Indians, to recover estate taxes assessed against the estate of Jacob Pierce, a full-blood Creek Indian, who died on Janu- are 2, 1933; it is *held* that under the provisions of Section 4 of the Act of May 10, 1928, the inclusion within decedent's gross estate of the 160 acres of land allotted to the decedent in accordance with the Creek Agreement (31 Stat. 861) and subsequent amendatory acts, and duly recorded as required by the statutes, was erroneous; and plaintiff is entitled to recover so much of the estate taxes assessed, which resulted from the wrongful inclusion in decedent's gross estate of the value of the allotted lands, plus lawful interest.

Same; Indian tax exemption liberally construed; immaterial that statute exempting allotted lands from taxation does not mention estate or inheritance taxes.—In the case of *Oklahoma State Tax Commission* v. *United States*, 319 U. S. 598, it was held that the fact that the Federal statutes granting tax exemptions on Indian allotted lands do not mention inheritance or estate taxes, is unimportant, since, contrary to the general rule Indian tax exemptions are to be liberally construed. See *Carpenter* v. *Shaw*, 280 U. S. 363. *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57, distinguished.

Same; Oklahoma Tax Commission case controlling as to Federal as well as State taxes.—In the *Oklahoma Tax Commission* case, the tax under consideration was a State tax; the tax levied in the case at bar is a Federal tax, but this is immaterial, since both taxes are identical in character; both are estate taxes levied upon transfers of property by death.

The Reporter's statement of the case.

Mr. Huston Thompson for the plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

This case is before the court on motions for a new trial filed by plaintiff and by the defendant. Upon consideration thereof plaintiff's motion is allowed and the former findings of fact, conclusion of law and opinion are withdrawn, and the following findings of fact, conclusion of law and opinion are substituted therefor. Defendant's motion for a new trial is overruled.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Muskogee, Oklahoma, and is the duly appointed and acting Superintendent of the Five Civilized Tribes of Indians, and has under his supervision and jurisdiction the affairs of the estate of the decedent herein, including estate tax matters. As such Superintendent, he is the representative of the Secretary of the Interior, who by law is the trustee of the property of restricted Indians of the Five Civilized Tribes.

2. Decedent, who died on January 2, 1933, a resident of Boley, Oklahoma, was a full-blood Creek Indian, being enrolled opposite Creek Roll No. 3074.

3. On or about May 2, 1935, plaintiff filed an estate tax return for decedent's estate with the Collector of Internal Revenue for Oklahoma, which said return disclosed no estate tax liability.

4. During January 1936 the Commissioner of Internal Revenue notified plaintiff that a deficiency of $88,393.66 in estate tax had been determined against the decedent's estate. Notice of this determination was given plaintiff by a 90-day letter, dated January 31, 1936.

By said letter it was determined that decedent's estate was subject to the Federal estate tax. In arriving at said deficiency, there was included in the gross estate two-fifths of the value of 160 acres of land allotted to decedent, plus the same percentage of his oil and gas royalty interest therein, totalling $51,384.50, an undivided interest in allotted lands inherited by decedent from other full-blood, restricted Indians in the amount of $1,250.00, cash in the total amount of $806,113.02, and other miscellaneous property, consisting of automobiles and household goods, in the amount of $504.00.

5. Said deficiency in estate tax of $88,393.66 was paid to the Collector of Internal Revenue for the District of Oklahoma on August 11, 1936.

6. On or about July 13, 1937, plaintiff filed a claim for refund in the amount of $88,393.66 with the Collector of Internal Revenue for the District of Oklahoma.

7. On or about February 25, 1939, the Commissioner of Internal Revenue advised plaintiff by letter of that date of the disallowance of plaintiff's claim for refund in the amount of $88,393.66, and the determination of an additional deficiency of $11,815.51. The additional deficiency resulted from the inclusion within decedent's estate of the value of the remaining three-fifths of the 160 acres of allotted land.

8. On or about August 3, 1939, plaintiff filed with the Collector of Internal Revenue for the District of Oklahoma an amended claim for refund in said sum of $88,393.66 on the same grounds set forth in the original claim filed on or about July 13, 1937, and in addition thereto asserting that the estate was entitled to credit for inheritance taxes paid to the State of Oklahoma of $25,146.25.

9. On or about August 26, 1939, the Commissioner of Internal Revenue issued a certificate of overassessment, allowing a refund of Federal estate tax in the amount of $13,330.74 on account of the claimed credit for inheritance taxes paid to the State of Oklahoma.

The refund of $13,330.74 was arrived at by allowing the full credit claimed for inheritance taxes of $25,146.25, and off-setting against said amount $11,815.51, representing the additional deficiency set forth above. Due to said credit for inheritance taxes the net tax liability of decedent's estate was reduced to $75,062.92.

10. Decedent at the time of his death was possessed of the following properties:

(a) One hundred sixty acres (160) of land in Seminole County, Oklahoma, which had been allotted to him under the provisions of the Act of Congress of March 1, 1901 (31 Stat. 861), as amended by the Act of Congress of June 30, 1902 (32 Stat. 500), ratified by the Creek Nation on May 25, 1901, which said lands are described as

> West Half (W½) of the Southeast Quarter (SE¼), and the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼) of Section 33, Township 11 North, Range 8 East, containing 120 acres, the same being decedent's surplus lands, and
>
> Northeast Quarter (NE¼) of the Southeast Quarter (SE¼) of Section 33, Township 11 North, Range 8 East, containing 40 acres, the same being decedent's homestead.

(b) Inherited lands, as follows:

> Undivided ½ interest in the Southeast Quarter (SE¼) of the Northeast Quarter (NE¼) and Lot One (1), Section 6; and lot One (1) and West Half (W½) of the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) and West Half (W½) of the East Half (E½) of the Northeast Quarter (NE¼) and North 10 acres of Lot Four (4), Section 18; all in Township 11 North, Range 8 East of I. M. Okfuskee County, Oklahoma.

allotted to Sallie Pierce, a full-blood Creek Indian, enrolled opposite Roll No. 3075.

> Undivided ¼th interest in Southwest Quarter (SW¼) of the Southwest Quarter (SW¼), Section 26, Township 7 North, Range 9 East of the Indian Meridian, Hughes County, Oklahoma,

allotted to Peter Wallow, a full-blood Creek Indian, enrolled opposite Roll No. 7702.

Undivided ½ interest in the Northwest Quarter (NW¼) of the Southwest Quarter (SW¼) Section 32, Township 7 North, Range 9 East of the Indian Meridian, Hughes County, Oklahoma,

allotted to Mahala Nelson, full-blood Creek Indian, enrolled opposite Roll No. 3171. All of said inherited lands were allotted to said named Indians under the provisions of the aforesaid Acts of Congress of March 1, 1901, and June 30, 1902, and ratified by the Creek Nation on May 25, 1901.

(c) Cash of $802,567.74, of which $44,168.16 was unrestricted money on deposit in banks of Oklahoma, and of which $758,399.58 was money to be credited to the decedent's account with the Department of the Interior, restricted to the extent that decedent could not use, pledge or dispose of it without approval of the Secretary of the Interior.

(d) Other miscellaneous property, consisting of automobiles and household goods.

11. All of said allotted and inherited lands at the time of decedent's death were fully restricted and could not be sold, leased, or otherwise encumbered without the approval of the Secretary of the Interior, under the Act of Congress of April 26, 1906 (34 Stat. 137), ratified and approved by the Creek Tribe October 2 and 3, 1907, and by the President of the United States on September 17, 1907, and the Act of May 27, 1908 (35 Stat. 312). The certificate of exemption from taxation of said allotted lands, issued under the provisions of the Act of Congress of May 10, 1928 (45 Stat. 495) reads as follows:

Endorsed: Office of Indian Affairs Received Dec 27 1929 62750.

Certificate on Designating Lands Exempt From Taxation

Five Civilized Tribes

OKEMAH, OKLA., *April 24th, 1929.*

Pursuant to Section 4 of the Act of Congress of May 10, 1928 (Public No. 360—70th Congress), the following described restricted Indian lands belonging to Jacob Pierce, a full blood citizen of the Creek Nation, Roll No. 3074, are hereby selected and designated as

tax exempt as long as the title thereto remains in the said Jacob Pierce or in any full blood Indian heir or devisee of said lands; such tax exemption, in no event, however, to extend beyond April 26, 1956:

Subdivision:	Sec.	Twp.	Range	Area	County
SE4	33	11 N	8 E	160	Seminole

Witnesses:
O. L. BURNEY.
SAMUEL ANDERSON.

[Thumb Mark]
JACOB PIERCE his mark

DEPARTMENT OF THE INTERIOR

WASHINGTON, D. C., *Feb. 3, 1930.*

Approved:
JOS. M. DIXON,
First Assistant Secretary.

To be signed by the Indian, or by the Superintendent if the Indian is a minor, incompetent adult, or where the Indian fails to designate.

Indexed Dept. of Interior to Public.

STATE OF OKLAHOMA,
Seminole County, ss:

I hereby certify that this instrument was filed for record in my office the 3 day of May, A. D., 1930, at 8 o'clock A. M. and is duly recorded in Record 417 Page 205.

[SEAL] ELLIS CASPER,
County Clerk,
By AUBYE BOND.

Filed for record on the 26 day of June 1931, at 9 o'clock A. M., and recorded in Book 20 Page 74.
A. M. LANDMAN,
Supt. for the Five Civilized Tribes.
By GERTRUDE HOOTON,
Clerk.

12. Under date of October 27, 1919, an oil and gas mining lease was entered into by decedent covering all of said 160 acres of land allotted to decedent as aforesaid, which said lease was approved by the Secretary of the Interior on March 30, 1920. Production was had under said lease on

March 1, 1925, and the lease is still producing in paying quantities, and the royalties therefrom, under the provisions of the lease, are paid to the Superintendent of the Five Civilized Tribes.

13. From March 1, 1925, the date of original production under said oil and gas lease on decedent's allotment, to January 2, 1933, the date of decedent's death, there were paid into the Agency for the Five Civilized Tribes for decedent's account oil and gas royalties in the total sum of $788,872.61. During this period there was also credited to decedent's account interest in the total sum of $130,282.62 and rentals in the total sum of $25.00. Adding these sums together, there is an indicated income of $919,180.23.

Of the moneys received amounting to $919,180.23, there was disbursed during this period to decedent, or for his benefit, a total of $160,774.59.

14. Of the cash possessed by the decedent at the time of his death, $615,854.67 represents oil and gas royalties which accrued to decedent prior to April 26, 1931.

15. The income flowing from decedent's restricted, allotted and inherited lands was credited to his account with the Superintendent of the Five Civilized Tribes and disbursed under the supervision of the Secretary of the Interior. The greater portion of decedent's funds was deposited by the Superintendent of the Five Civilized Tribes with the Treasurer of the United States, and the balance of his funds was deposited with banks in conformity with the general practice of the Secretary of the Interior in managing the financial affairs of members of those tribes. The funds placed with the Treasurer of the United States did not bear interest. The funds deposited in banks did bear interest. No individual Indian's funds were directly placed with banks at interest. Funds from the general balance were placed with banks at interest and when interest was received semi-annually, the amount received was equitably divided and credited to the accounts of all restricted Indians at the Agency in proportion to their cash balances on the interest-paying dates. This procedure resulted in an average yield to the account of the decedent of 2.89 per cent interest per

annum. Decedent had the use of such funds from his account with the Superintendent of the Five Civilized Tribes as were authorized by the Secretary of the Interior to be paid to him, or were expended by the Superintendent of the Five Civilized Tribes, under departmental supervision, in the purchase of personal property for him. Title to personal property, other than clothing, etc., was taken on a restricted bill of sale in the name of the United States for the use and benefit of the decedent. All investment problems concerning the decedent's restricted funds were handled by the Superintendent of the Five Civilized Tribes under departmental supervision.

16. Decedent left a last will and testament, dated November 22, 1929, by which, after certain small specific bequests, decedent devised two-fifths of his entire estate to John H. Jones, a three-quarter blood Creek Indian, enrolled opposite Creek Roll No. 5869, and three-fifths of his entire estate to his only daughter, Silla Micco, a full-blood Creek Indian, enrolled opposite Creek Roll No. 3077.

17. All of the restricted funds belonging to the decedent at the time of his death, except such amounts thereof as were disbursed under departmental supervision for the support and maintenance of the decedent and his daughter, were then, and have been at all times since then, retained by the Superintendent of the Five Civilized Tribes, under the supervision of the Secretary of the Interior, in trust for the devisees of said decedent. No actual distribution direct to the devisees has been made, as the devisees are fully restricted Indians under Acts of Congress, but their respective interests in the estate have been credited to their restricted accounts at the Five Civilized Tribes Agency, subject to supervision and disbursement by the Superintendent under the direction of the Secretary of the Interior for the use and benefit of the devisees.

The court decided that the plaintiff was entitled to recover of the defendant the sum of $15,782.13, the amount of taxes assessed and collected as a result of the inclusion within the decedent's gross estate of the value of the 160 acres of allotted lands, to wit, $128,461.25, plus interest according to law.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit by plaintiff, as the Superintendent of the Five Civilized Tribes, to recover estate taxes assessed against the estate of Jacob Pierce, a full-blood Creek Indian, who died on January 2, 1933.

Upon Pierce's death the plaintiff filed for him an estate tax return showing no estate taxes due. The Commissioner of Internal Revenue, however, determined and assessed a deficiency against his estate of $88,393.66. This was later reduced to $75,062.92. Plaintiff sued to recover this sum on the ground that the Commissioner wrongfully included in the gross estate of Jacob Pierce the value of an allotment to him of 160 acres of land in Oklahoma and certain inherited lands and certain restricted cash, all of which was said to be tax-exempt. However, in his brief plaintiff limits his claim to the alleged wrongful inclusion within Pierce's gross estate of the value of 160 acres of allotted lands.

It is agreed that the amount included in the gross estate for the value of the 160 acres of land was $128,461.25. Plaintiff says that this should not have been included in his estate because of the provisions of the original Creek Agreement of March 1, 1901 (c. 676, 31 Stat. 861), and of the Act of April 26, 1906 (c. 1876, 34 Stat. 137), and of the Act of May 27, 1908 (c. 199, 35 Stat. 312), and of section 4 of the Act of May 10, 1928 (c. 517, 45 Stat. 495, 496). Section 4 of the Act of May 10, 1928, provides, in part:

> * * * That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected. * * *

The section further provides for the recording of this certificate with the superintendent of the Five Civilized Tribes and in the records of the county in which the land is situated, and then further provides:

> * * * and said lands, designated and described in the approved certificates so recorded, shall remain ex-

> empt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land * * *.

The Act of January 27, 1933 (47 Stat. 777), extended the period of tax exemption of such lands until April 26, 1956. Decedent died on January 2, 1933.

The 160 acres of allotted lands, the value of which was included by the Commissioner in the decedent's gross estate, had been designated and described in approved certificates and recorded in full compliance with the provisions of section 4 of the Act of May 10, 1928, *supra.*

We are of the opinion that the transfer of such land at the death of the decedent was exempt from Federal taxation under the provisions of section 4 of the Act of May 10, 1928, *supra*, and under the decision of the Supreme Court in *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598. In that case there was involved the right of the State of Oklahoma to subject to its estate tax certain land exempt from direct taxation, land not exempt from direct taxation, restricted cash and securities held for the Indians by the Secretary of the Interior, and miscellaneous personal properties and insurance. The court divided 5 to 4 on the propriety of the inclusion within the estate of the Indians of the land not exempt from direct taxation, the restricted cash and securities, and the miscellaneous personal properties and insurance, but it was unanimous in holding that the land exempt from direct taxation under the provisions of section 4 of the Act of May 10, 1928, *supra*, should not have been included. In the majority opinion (pp. 610, 611) it was said:

> The validity of the taxes on the transfer of the land presents a somewhat different problem. Some of these lands are exempt from direct taxation by virtue of explicit congressional command. The Act of May 10, 1928, 45 Stat. 495, for example, provides that Indians of a class which includes the three deceased should select up to 160 acres of his allotted, inherited or devised restricted lands, which "shall remain exempt from taxation while the title remains in the Indian designated * * * or in any full-blood Indian heir or devisee," while all other restricted lands are made subject to taxation by Oklahoma. The State argues that congressional

exemption of the land from direct state taxation does not exempt the land from an estate tax, because of the principles announced in *United States Trust Co.* v. *Helvering*, *supra*. A majority of the Court concludes that this principle does not apply to Indian lands specifically exempted from direct taxation. We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the State are also exempted from estate taxes.

Mr. Justice Murphy, in his dissenting opinion, in which the Chief Justice and Mr. Justice Reed and Mr. Justice Frankfurter joined, said:

> * * * Most of their allotted lands were expressly exempt from taxation, and, as the opinion of the Court recognizes, this removed them from the operation of Oklahoma's estate tax.

In a note supplementing this statement he further said:

> The fact that the exemptions do not mention inheritance or estate taxes is unimportant. As pointed out before, contrary to the general rule Indian tax exemptions are to be liberally construed. See *Carpenter* v. *Shaw*, 280 U. S. 363, 366–67. For that reason decisions, such as *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57, that statutory exemptions from taxation do not include an exemption from estate taxes, have no application here.

It appears, therefore, that both the majority and the minority were in agreement that the Act of May 10, 1928, was intended not only to cover direct taxes on the lands, but was intended to cover as well a tax on the privilege of transferring the lands at death.

The tax under consideration in *Oklahoma Tax Commission* v. *United States*, *supra*, was a State tax; the tax levied in the case at bar is a Federal tax, but this is immaterial, since both taxes are identical in character; both are estate taxes levied upon transfers of property by death. Section 301 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 69) levies a tax "upon the transfer of the net estate of every decedent * * *." The Oklahoma tax, according to the opinion of the Supreme Court in *Oklahoma Tax Commission* v. *United States*, *supra*, p. 600, was levied "upon all transfers made in contemplation of death or intended to take effect after death as well as transfers 'by will or the intestate laws

of this state.' "[1] Since the lands are exempt from State estate taxes, it necessarily follows they are exempt from Federal estate taxes.

We are of the opinion that the Commissioner of Internal Revenue wrongfully included in the decedent's gross estate the value of the 160 acres of allotted lands, and, therefore, under the special findings of fact and conclusion of law which have been made by the court in this case, that plaintiff is entitled to recover so much of the taxes assessed as resulted from the inclusion in decedent's gross estate of the value of the allotted lands. This amount it is agreed is $15,782.13. Judgment for this amount, plus interest according to law, will be entered in favor of plaintiff. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE UNDER TRUST CREATED BY CLARE G. JOHNSON, DECEASED, v. THE UNITED STATES

[No. 46003. Decided February 5, 1945]

On Plaintiff's Motion for New Trial

Estate tax; property transferred at death under irrevocable trust; no reservation to settlor under applicable New York State law.—Where trust provided for payment of income to settlor during life and upon settlor's death the principal was to be paid to settlor's three minor children in equal shares, or to survivor, with same share to surviving children of any predeceased child; and where under controlling laws of New York State it could not be said that settlor intended to reserve any estate in herself; it is *held* that principal of trust was not taxable as a "transfer intended to take effect in possession at or after death of transferor", under the provisions of Section 811 (c), U. S. Code Title 26, and plaintiff, trustee, is entitled to recover.

[1] Ch. 162, Sess. Laws of the State of Oklahoma, 1915; Ch. 66, Art. 5, Sess. Laws of the State of Oklahoma, 1935.

The Reporter's statement of the case:

On November 6, 1944, a decision was rendered in this case, the opinion by Judge Madden holding that, following the decision in *Helvering* v. *Hallock*, 309 U. S. 106, 112, the plaintiff was not entitled to recover. Chief Justice Whaley concurred, and Judge Whitaker, in a separate opinion, concurred in the result. Judge Littleton dissented.

On plaintiff's motion for new trial, which was granted February 5, 1945, the former opinion was modified, as shown below, the former findings of fact were adopted and confirmed, with an amendment (finding 12) and an opinion, by Judge Whitaker, was filed holding that plaintiff was entitled to recover, in which Chief Justice Whaley concurred. Judge Littleton concurred in a separate opinion, and Judge Madden filed a dissenting opinion.

Defendant's motion for new trial was overruled April 2, 1945.

Mr. Harold L. Herrick for the plaintiff. *Mr. Huber B. Lewis* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on plaintiff's motion for a new trial. On the former hearing both at the bar and in their briefs both parties argued the case on the assumption that if Mrs. Johnson's three children died without issue before she did, the trust would fail and the property, therefore, would revert to her. We were accordingly of the opinion, since Mrs. Johnson must have known that, or was at least chargeable with that knowledge, that she must have intended to reserve that possibility of reverter.

But, now, on motion for a new trial plaintiff earnestly argues that under the law of New York, in which State Mrs. Johnson resided when the trust instrument was executed, the property would not have reverted to her, but would have vested absolutely in the last surviving remainder man even if he had died before the settlor, or that it would

have been divided equally between the estates of the three remainder men if all had predeceased the settlor. It cites several New York cases holding, in the case of wills, that the remainder interest vests absolutely in the last surviving remainder man, even though that last survivor dies before the life tenant. *Matter of McCombs*, 261 App. Div. 449; aff. 287 N. Y. 557; *Matter of Hadden*, 178 Misc. 939; *Matter of Stephanie*, 161 Misc. 803; aff. 252 App. Div. 705. Cf. *Jarman on Wills*, 7th Ed. p. 1340.

There may be some doubt that these decisions are equally applicable to remainder interests created by trusts, but they may be, and Mrs. Johnson may have thought that they were when the trust instrument was executed. If she did, even though she may have been mistaken, it cannot be said that she "intended" to reserve any interest in herself, even the possibility of a reverter. The Act taxes only those transfers which are "*intended* to take effect in possession or enjoyment at or after * * * death." (Italics ours.) Unless she "intended" to reserve some estate in herself, other than the life estate, the transfer does not come within the terms of the taxing act, even though she did not succeed in actually divesting herself of all possibility of an interest therein.

Our conclusion on the former hearing that she had "intended" to reserve this possibility of a reverter was based on the statement of the parties that this was the necessary result of the trust instrument under the New York law. Therefore, we concluded, Mrs. Johnson must have "intended" this result. If this was not the necessary result under the law, as now appears, then such an intention is not necessarily to be implied.

In all cases heretofore decided the intention to make such a reservation was expressed. There was no doubt of an intention of reserving something that should pass only at death. But, we do not suppose that it is necessary that such an intention be expressed; it may as well be implied from all the facts and circumstances.

However, we are of opinion that the facts of this case do not disclose such an intention, but rather negative it. The property Mrs. Johnson had, she had acquired from her deceased husband; she was about to remarry, and she evidently

wanted to insure that the children of her former marriage would succeed at her death to the property that had been their father's, without having to divide it with her husband-to-be or any other children she might have. She was 42 years old and the children were 11, 19, and 20, respectively. We doubt she ever thought about the possibility that she might survive her children and their children. To say the least, that possibility was quite remote and might easily have been overlooked. But if she did think of it, did she think the property would come back to her in that event or go to the heirs of the survivor of her children and their issue? We do not know, but we do feel sure under the facts that she thought she was completely disposing of the property, save only for a life interest in it which she retained for herself.

Convinced that this was her intention, we do not think it can be said that this was a transfer "intended to take effect in possession or enjoyment" at her death. We are of opinion she meant to dispose of the remainder interest completely, in her lifetime, leaving nothing of the remainder to vest only at her death.

Plaintiff's motion for a new trial is granted. The findings of fact heretofore filed on November 6, 1944, are adopted and confirmed, but there is added as finding 12 the following:

> 12. The transfer of the property in trust, as set out in finding 3, was not intended to take effect in possession or enjoyment at the death of the settlor.

The former opinion is modified in accordance with the foregoing, but the former conclusion of law is withdrawn, and the following is substituted therefor:

CONCLUSION OF LAW

> Upon the findings of fact heretofore filed and as amended herein, the court concludes as a matter of law that the plaintiff is entitled to recover of the defendant the sum of $148,696.03, together with interest as provided by law.
>
> It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one hundred forty-eight thousand six hundred ninety-six dollars and three cents ($148,696.03), together with interest as provided by law. It is so ordered.

WHALEY, Chief Justice, concurs.

LITTLETON, *Judge*, concurring. I concur in the foregoing opinion, but I would go further and hold on the record in this case that, notwithstanding the decisions of the New York courts referred to, plaintiff would be entitled to recover since the transfer when made was absolute and irrevocable, and any possibility of reversion to the grantor through the prior death of the named beneficiaries, including their issue, was too remote to justify the taxing authorities implying an intention on the part of the donor to reserve a reversionary interest of such a character as would justify the Government in including the value of the trust property in the gross estate for the purpose of the excise tax upon a transfer "intended to take effect in possession or enjoyment at or after death" within the meaning of the taxing act.

I think the rule announced in *Helvering* v. *Hallock*, 309 U. S. 106, where a reversionary interest was explicitly retained, should not be extended by implication and without proof that such was the intention of the donor.

MADDEN, *Judge*, dissenting:

In our original decision we followed the assumption of both parties that the grantor continued, after the conveyance in trust, to have an interest in the corpus of the trust, and would have gotten it back, if all of her children had predeceased her without issue. We held that the fact that her interest remained in her by inertia rather than by express provision of the trust instrument was not controlling.

In its motion for a new trial the plaintiff gives the trust instrument an essentially different construction. It now says that the grantor had no interest at all in the corpus; that under no circumstances would the property have come back to her. Though the plaintiff does not say so, I recognize, of course, that what the grantor might have received by inheritance from her children has no bearing on the question.

In determining the correctness of the interpretation of the trust instrument now urged by the plaintiff, it becomes necessary to consider what would have happened to the property if all of the three children had predeceased their

mother without issue. If the mother had no interest in the corpus, either the estate of each child would have taken one-third of the property when the mother died, or the estate of the last survivor of the three, even though he did not survive the mother, would have taken all the property. The plaintiff takes no position as to which of these results would have followed. I recognize that there is a good deal of unreality about trying to determine, for the purpose of applying the estate tax statute, where property would have gone under the terms of a conveyance, if certain things had happened which did not happen. If the events which I am assuming had in fact happened, the court which had the instrument to interpret would have had a real flesh and blood case, not an abstraction, to deal with. If the children had all died without wills, spouses, or creditors, the mother, if she had no reversionary interest, would probably have taken as heir of the survivor, who would have taken the shares of the others as their heir, and the question of the capacity in which she took might not have been very important. But if one or more of the children had come of age and made a will, or had married and thus left a statutory heir, or had become heavily involved in debt, and then they had all died before their mother, the question of whether their mother's bounty should go to strangers without the children ever having had it, would have been no mere hypothetical question.

I think that if the question had arisen as I have stated it, the court would have held that the mother was entitled to the property; that the children did not have inheritable interests unless they survived the mother.

No exact precedent can be cited, of course, for our task is to give meaning to words different from any that have been litigated. The New York statutory definition in Section 40 of its Real Property Law is of no assistance. It, as interpreted in *Moore* v. *Littel*, 41 N. Y. 66, defines as a vested remainder the interest of one who, "if the life estate should now cease, would *eo instanti et ipso facto* have an immediate right of possession * * *." Under that definition a conveyance to A for life, then to B and his heirs if B survives A, would give B a vested remainder, but so calling it would neither enhance its value in B's hands nor diminish

the chance which the grantor would have of getting the property back if B did not survive A. Nor should such a definition affect the taxability of the substantial interest which the grantor has in the property, if he dies before A dies. The plaintiff cites some English cases which give substantial support to the interpretation for which it contends. *Harrison* v. *Foreman* (1800), 5 Ves. 207; *Browne* v. *Kenyon* (1818), 3 Mad. 410; *Sturgess* v. *Pearson* (1819), 4 Mad. 411; *Maddison* v. *Chapman* (1861), 1 J. and H. 469; *Wiley* v. *Chanteperdrix* (1893), 1 Ir. R. 209.

In the instant case, the grantor directed the trustee "upon my death to assign, transfer and set over" the property "to my three children" naming them "and the survivor or survivors of them" with the provision for issue of the children to take their parent's share. While the so-called "divide and pay over" rule is not in good repute, nevertheless I think there is some, perhaps slight, significance in the fact that the only gift to the children is in the direction to pay over the property to them at their mother's death; that for the trustee to pay over the money, not to the child, but to a devisee or creditor or spouse of the child would not be very obviously within the terms of the direction. I think that the gift here made to the three children "and the survivor, or survivors of them" is not greatly different from a gift to "such of the three children as survive me" which latter expression would rather plainly give interests subject to the condition precedent of surviving the mother. I think that the grantor's express statement, after the gift to the children "and the survivor, or survivors of them," "but if any of my said three children has predeceased me and left issue him or her surviving," then such issue should take that share, is hardly consistent with an intent that in certain circumstances, if a child so died and left no such issue, his share would go to his creditors, or devisees, or spouse.

I realize that the interpretation which a court gives to such an instrument must necessarily be subject to misgivings as to its correctness. I have, however, little doubt as to what interpretation the grantor would have wished to have given to the instrument, if the events, which I have been obliged to assume, had occurred. I know of no canons of interpre-

tation, currently significant, which exert much pressure one way or another in a case involving language and circumstances such as those before us. The instrument being an *inter vivos* transfer and not a will, the presumption against partial intestacy has no bearing. And feudal reasons of policy favoring vestedness have no significance in these times, and as to the kind of property here involved.

I think our former decision was right and I would therefore, deny the motion for a new trial.

JONES, *Judge*, took no part in the decision of this case.

SPECIAL FINDINGS OF FACT

Upon a stipulation by the parties the court, on November 6, 1944, made special findings of fact, which as amended, adopted and confirmed, February 5, 1945, are as follows:

1. Clare G. Johnson (formerly known as Clara G. Davis) died on September 23, 1941, a citizen of the United States and a resident of Winter Park, Orange County, Florida.

2. On December 5, 1941, the Last Will and Testament of Clare G. Johnson was duly admitted to probate by the County Judge's Court of Orange County, Florida, and Letters of Administration c. t. a. thereon were issued by said Court on December 15, 1941, to Ferdinand H. Davis, of New York City, New York, who was finally discharged as said Administrator c. t. a. by order of said Court, dated May 15, 1943. The will had been executed November 8, 1922, in anticipation of the re-marriage of the testatrix, which re-marriage occurred January 20, 1923. The will was never revoked. It devised her property to her three named children in substantially the same manner as was provided for the property conveyed in trust, as appears in finding 3.

3. On October 23, 1922, Clara G. Davis (who through a later marriage became known as Clare G. Johnson), by an instrument in writing created a certain trust in which she agreed to assign, transfer and set over unto Central Union Trust Company of New York (now known as Central Hanover Bank and Trust Company), the petitioner herein, 49,500 shares of Imperial Tobacco Company of Canada, Limited,

ordinary stock, in trust, to collect the dividends therefrom and pay the same to her during her life, with remainder to her three children, Gertrude Clare Davis, David T. Davis, and Ferdinand H. Davis, and the survivor or survivors of them, in equal shares, the share of any deceased child to go to its surviving issue, if any, in equal shares, which trust was declared to be irrevocable by an express statement therein. A copy of the trust instrument, marked A–1, is part of Exhibit A, attached to the petition herein and by reference made a part hereof. After the execution and delivery of the trust instrument it was amended by a written agreement between said Clare G. Johnson (formerly Clara G. Davis) and the trustee, dated January 4, 1929, a copy of which agreement, marked A–2, is part of Exhibit A, attached to the petition herein and by reference made a part hereof. This agreement was approved by Gertrude Clare Davis, Ferdinand H. Davis, and David T. Davis, by instruments in writing, dated January 4, 1929, January 7, 1929, and March 27, 1941, copies of which instruments, marked respectively A–3, A–4, and A–5, are part of Exhibit A, attached to the petition herein and by reference made a part hereof. The trust instrument dated October 23, 1922, as amended by the agreement dated January 4, 1929, was in full force and effect at the time of the death of Clare G. Johnson on September 23, 1941, when the trust terminated according to its terms. The 49,500 shares of Imperial Tobacco Company of Canada, Limited, ordinary stock were delivered to the Trustee on January 5, 1929, and there has been no addition to the trust fund since its original establishment.

4. On October 23, 1922, when the trust instrument was executed, the grantor, Clara G. Davis (thereafter known as Clare G. Johnson) was 42 years old as of her nearest birthday and her daughter, Gertrude Clare Davis, and her sons, David T. Davis and Ferdinand H. Davis, were respectively 11, 20 and 19 years old as of their nearest birthdays and at that date the children had no issue. On September 23, 1941, the date of the death of Clare G. Johnson, all three of her children were living and there were also living Helen Clare Elizabeth Davis, a daughter of said David T. Davis, who was then 13 years old as of her nearest birthday, and Evan R. Powell and

David G. Powell, sons of said Gertrude Clare Davis, who were then respectively 7 years old and 8 years old as of their nearest birthdays.

5. Ferdinand H. Davis, as Administrator c. t. a., filed with the Collector of Internal Revenue for the District of Florida, on April 27, 1942, a federal estate tax return for the estate of Clare G. Johnson. The assets of the trust were described in that return and copies of the trust instruments were annexed thereto, but the assets were not included as a part of decedent's estate and the return as filed disclosed that no estate tax was due from the estate.

6. Upon the audit of the federal estate tax return, the Commissioner of Internal Revenue asserted against petitioner, as trustee and transferee of the trust, a net deficiency in federal estate tax, after allowance of the full eighty per cent credit for estate inheritance taxes provided for by Section 813 (b) of the Internal Revenue Code, of $148,476.37, which amount, together with interest of $219.66, making a total of $148,696.03, was thereafter assessed against petitioner.

7. In computing that deficiency the Commission of Internal Revenue included as a part of the gross estate of the decedent the sum of $599,837.98, representing the value of the trust, that amount having been included as part of the gross estate solely on the ground that the transfer was one to take effect in possession or enjoyment at or after death because under the terms of the trust Clare G. Johnson (formerly Clara G. Davis), the grantor, had reserved to herself the right to the income of the trust fund during her lifetime, and because of the possibility that the principal of the trust might revert to the grantor as a result of the failure of the trust, in the event that the grantor's three children and their issue should all predecease the grantor. The Commissioner of Internal Revenue has made no claim that the transfer was made in contemplation of death.

8. The petitioner, on December 31, 1942, paid to the Collector of Internal Revenue for the District of Florida, the amount of the alleged deficiency in the sum of $148,476.37, together with interest thereon of $219.66, making in all the sum of $148,696.03, the full amount of the assessment.

9. On March 12, 1943, the petitioner caused to be filed with the Collector of Internal Revenue for the District of Florida a claim for the refund of said $148,696.03, based on the ground that no part of the value of the trust fund was includible in the gross estate of the decedent. A copy of that claim for refund is attached to the petition herein marked Exhibit A and is made a part hereof by reference.

10. By a letter to the petitioner, dated August 17, 1943, a copy of which is attached to the petition herein, marked Exhibit B and made a part hereof by reference, the Commissioner of Internal Revenue rejected the petitioner's claim for refund.

11. No part of said $148,696.03 has been refunded to petitioner.

[12. The transfer of the property in trust, as set out in finding 2, was not intended to take effect in possession or enjoyment at the death of the settlor.]

MADDEN, *Judge*, delivered the original opinion of the court, November 6, 1944:

The plaintiff is the trustee of a trust created by Clare G. Johnson in 1922. She was 42 years old at that time and intended to remarry. She transferred some $600,000 worth of property to the trustee in trust to pay the income to herself during her life. The trust instrument further provided:

> * * * and upon my death to assign, transfer and set over the said shares of stock and any increase thereof, and any and all other securities held by my Trustee under the terms and provisions of this trust, to my three children, Gertrude Clare Davis, David T. Davis, and Ferdinand H. Davis, and the survivor, or survivors of them, in equal shares, but if any of my said three children has predeceased me and left issue him or her surviving, to assign, transfer and set over the share such child would have received if living to its issue in equal parts; * * *

The trust instrument expressly declared itself to be irrevocable.

The three children named in the language just quoted were 11, 20, and 19 years old in 1922, and had no children.

When their mother died in 1941, they were all still living, and two of them had living children.

Upon the death of Mrs. Johnson the Commissioner of Internal Revenue included the property, which she had conveyed in trust, in her estate, and taxed the estate accordingly. Except for this inclusion, her estate was not large enough to be taxable. The plaintiff, as trustee and transferee of the trust property, paid the tax, amounting, with interest, to $148,696.03, and filed a timely claim for its refund, which claim was rejected.

The ground upon which the Commissioner subjected the trust property to the estate tax was that the transfer in trust was a transfer intended to take effect in possession at or after the death of the transferor, because (1) she had reserved to herself the income of the trust property for her life and (2) under the terms of the instrument the corpus of the property would have reverted to her if her three children named in the trust instrument had all predeceased her without issue.

The Government concedes that the first basis of the Commissioner's assessment was not valid. This trust was irrevocably created in 1922. The taxing statute was not amended until 1931 to expressly make the reservation of a life estate by a grantor the basis for including the property in the grantor's estate when he died. The Supreme Court of the United States held in *Hassett* v. *Welch*, 303 U. S. 303, that this amendment was not intended by Congress to apply to transfers made before its adoption in 1931.[1]

Our question, then, is whether the failure of the trust instrument to divest the grantor of all her interest in the property except the reserved life estate, thus leaving in her the chance that she might again become the complete owner of the property if her three children should predecease her without issue, which chance would continue until her death, made the conveyance in trust in the circumstances here present "a transfer * * * intended to take effect in possession or enjoyment at or after * * * [her] death" within the meaning of Section 811 (c) of the Internal Revenue Code; 26

[1] See also *N. Y. Trust Co.* v. *U. S.*, 100 C. Cls. 311.

U. S. C. 1940 ed. Sec. 811. We use the neutral word "chance" to describe Mrs. Johnson's remaining interest in the property, since the word reversion, the technically accurate name for it, would tend to attribute to her interest more substance and value than it actually had, and the words "possibility of reverter", the currently popular name for all uncertain interests involved in such tax problems, is not a true description of it.

To get the property, Mrs. Johnson's children or other issue had to fulfill a condition precedent, i. e. they had to survive Mrs. Johnson. If they did not, the property was hers, because it was hers to begin with and she had not given it to them except upon that condition. Her death then, before theirs, was necessary to put their gift beyond the chance of failure. We must determine whether the language of the Supreme Court in *Klein* v. *United States*, 283 U. S. 231, is applicable. The court said "It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." In the *Klein case* the grantor conveyed to his wife for life, and provided that if the wife should not survive him, the land should "in that event remain vested in said grantor." The conveyance further said: "upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take * * * the said lands in fee simple."

A comparison of the instant case with the *Klein case* shows the following things. In the instant case the grantor reserved the use of the property to herself for her life; in the *Klein case* the grantee, who was also given the remainder upon condition that she survive the grantor, was given the property for her life. In the instant case no express provision was made in the instrument as to where the property should go if the grantees did not survive the grantor; in the *Klein case* the instrument expressly provided that the land should "remain vested in said grantor." In the instant case the grantor was 42 years old and the grantees were 11, 20, and 19 years old at the time of the conveyance; in the *Klein case* the

grantor and grantee were husband and wife, but whether they were approximately the same age, or differed as much as the mother and her children in the instant case, is not disclosed by the court's decision. In the instant case there were three named grantees, with a provision that issue of any who died before the grantor leaving issue should be substituted for the deceased named grantee; in the *Klein case* there was only one named grantee, and no provision for the substitution of her issue.

In the case of *Helvering* v. *Hallock*, 309 U. S. 106, at page 112, the court said of the Klein decision:

> The inescapable rationale of this decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor.

In applying the test thus stated in the *Hallock case* to the instant case, we observe that the dispositions of Mrs. Johnson's transfer in trust bear a striking resemblance to the provisions of the law of inheritance as it would have operated without any transfer in trust, if she had in fact retained the property and if she had not remarried. The statutes of descent would have given her property to such, if any, of her children or more remote issue as survived her. If none survived her, and she had made no other disposition of the property, it would have gone to her collateral heirs. Her transfer in trust would have had the same effect. Again, her transfer in trust effected the dispositions which a normal parent, in her circumstances, would have written into an irrevocable will, if the law permitted such a will and permitted one to segregate a portion of his property to fulfill the gifts made by his will. The will, though irrevocable, would have been, as was the trust disposition, ambulatory in the respect that it provided for survivorship among the children or their issue down to the parent's death. If none survived, all the gifts would have lapsed, as they would, in effect, under the

trust disposition. And the testator would have had the enjoyment of the property during her life, and the right, if her issue predeceased her, to dispose of it *inter vivos* or by will or by letting it descend to collateral heirs, which she had under the trust disposition.

We think that Mrs. Johnson's arrangements for the devolution of her property were "too much akin to testamentary dispositions [or intestate succession] not to be subjected to the same excise." *Helvering* v. *Hallock*, *supra.*

The plaintiff urges that the absence of an express provision in the trust instrument that the property should revert to the grantor upon the failure of the children to survive her should have some weight. We think not. If it did, the estate tax could be avoided in practically all cases by making dispositions identical in substance with taxable dispositions but using a different form of words easily available to any conveyancing lawyer. The *Klein case* and the *Hallock case*, *supra*, both teach that taxability *vel non* must not be made to depend on forms of words. As to the statutory words, "intended to take effect" etc., the grantor certainly intended what she expressly said, that her surviving children or issue were to get the property, and she certainly meant thereby that her death should be the event after which their rights in the property might be ascertained.

The plaintiff urges that the degree of likelihood of the non-happening of the condition on which the grantees' taking depends should be a factor of importance. There is authority for this position. See, e. g., *Estate of Mabel H. Houghton*, 2 T. C. 871; *Estate of Ellen P. C. Goodyear*, 2 T. C. 885; *Estate of Henry S. Downe*, 2 T. C. 967. In *Commissioner* v. *Kellogg*, 3 Cir. 119 F. (2d) 54, there seems to have been no interest left in the grantor at all, unless the ultimate gift to his own next of kin be regarded, by some doctrine of "worthier title" as being a gift to himself and hence a legal nullity, leaving the ultimate interest undisposed of and hence in himself. See Restatement, Property § 314.

We find it difficult to see how taxability can be determined on the basis of the degree of probability that the property will revert to the grantor. The variations as they arise in

the cases, involving persons of all ages and conditions of health, are great. It has not even been suggested that, to make an interest left in the grantor taxable, the probability that the property will return to him must outweigh the improbability. If a preponderance of probability is not required, what degree of probability shall be required? In some of the Tax Court cases, the probability seemed, actuarially, to measure practically zero. Perhaps in such cases a test of *de minimis* could be applied. We do not have to face that problem in this case. The chance that Mrs. Johnson, a 42-year-old woman, might survive her three children and their possible issue was not negligible, but substantial.

We think that the remoteness or unlikelihood of the property's returning to the grantor, or indeed, the complete absence of any possibility of its returning, although it is a factor to be considered in determining taxability, may not be the determining factor. The fact that the grantor has made use of permissible conveyancing devices such as contingent remainders, shifting limitations, etc., to keep the ultimate ownership of the property uncertain until after the grantor's death, by eliminating from the list of his grantees those who predecease him, and adding to the list others, such as issue of named grantees who do not survive him, give the whole arrangement a decidedly testamentary flavor. This resemblance to a will might not be removed even by an ultimate disposition, upon the failure of all preceding and uncertain interests, which ultimate disposition would leave open no possibility that the property could also return to the grantor.

We also think that the Supreme Court's decision in *Hassett* v. *Welch*, *supra*, does not prevent us from considering the grantor's reservation of the use of the property to herself for her life as one factor, among the many factors present in the case, showing a resemblance to a testamentary disposition. We think it is such a factor, and that it, together with the fact that the gifts to the children and their issue remained uncertain and subject to increase or complete elimination by events which could occur at any time before the grantor's death, and the further fact that there was a chance that the

corpus of the property might revest in the grantor upon the happening of events which might occur at any time before her death, bring the case within the rule of *Helvering* v. *Hallock*, *supra*.

We conclude, therefore, that the plaintiff is not entitled to recover, and that the petition should be dismissed.

WHALEY, *Chief Justice*, concurs. [November 6, 1944]

LITTLETON, *Judge*, dissents. [November 6, 1944]

WHITAKER, *Judge*, concurring: [November 6, 1944]

I agree with the result and with the reasoning of the majority opinion, except that I do not agree, if a person prior to 1931 completely divested himself of all interest in the remainder, with no possibility of reverter, reserving to himself only the income for his life, that the property could properly be included in his gross estate.

WOODBURY GRANITE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44386. Decided March 5, 1945]

On the Proofs

Corporation dissolved; incapacity to sue.—Where the plaintiff, a Vermont corporation, filed its petition in the Court of Claims on December 15, 1938, pursuant to the Act of June 25, 1938 (52 Stat. 1197); and where thereafter, on December 16, 1942, the plaintiff filed with the proper State officials a declaration of dissolution, in accordance with the laws of the State of Vermont (Sections 1008 and 1009, Public Laws of Vermont, 1933), the effect of which was that the corporation no longer existed, it is *held* that the petition must be dismissed. *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257, 259, cited.

Same.—A corporation in existence when suit was instituted but going out of existence before judgment and not being represented in court by an assignee or liquidator, cannot become a judgment creditor. Under these circumstances, the only judgment possible is a judgment of dismissal.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for the plaintiff.

Mr. J. R. Wilheim, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. George E. Heidlebaugh* was on the brief.

The court made special findings of fact as follows upon the stipulation entered into by the parties:

1. Plaintiff, Woodbury Granite Co., Inc., was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Vermont, with its principal place of business at Burlington, Vermont.

2. Prior to June 16, 1933, the United States entered into the following contracts for the construction of post offices:

Number of contract	General contractor	Location of post office
T1sa 3463	McDe Company	Rockland, Mass.
T1sa 3628	Kenny Brothers, Inc	Albany, New York
T1sa 4114	V & M Construction Company	Littleton, N. M.
T1sa 4144	A. J. deKoning	Oberlin, Ohio

3. Prior to June 16, 1933, plaintiff, as subcontractor, entered into four subcontracts to furnish certain granite stones for the post offices mentioned in the preceding finding. These four subcontracts were made with the respective general contractors who had entered into the aforesaid contracts with the United States to construct the post offices in question.

4. On July 28, 1933, plaintiff signed the President's Reemployment Agreement. In anticipation of this and pursuant thereto, the plaintiff had increased the wages of its employees effective July 24, 1933, on which date it had also reduced the work week from 44 to 40 hours. On September 17, 1933, the work week was further reduced to 35 hours. As a result, plaintiff incurred increased costs in the performance of the aforesaid subcontracts in the amount of $350. Plaintiff hereby waives and abandons any and all other claims heretofore asserted for increased costs incurred by it as a result

of the enactment of the National Industrial Recovery Act (49 Stat. 195).

5. Plaintiff has fully performed all of its obligations under the foregoing subcontracts and has been paid the agreed compensation therefor.

6. Under the Act of June 16, 1934 (48 Stat. 974), plaintiff on December 11, 1934, and within six months after the enactment of said Act, filed claims with the Treasury Department, the department concerned, for increased costs on the subcontracts mentioned in Finding No. 3. Because the supporting data furnished by plaintiff was, on examination, deemed to be insufficient by the Treasury Department, the claims were never transmitted to nor acted upon by the Comptroller General of the United States.

7. On December 15, 1938, plaintiff filed its petition in this court pursuant to the Act of June 25, 1938 (52 Stat. 1197). Except as herein stated, no action has been taken on the claims in question by Congress or by any department of the Government and no assignment or transfer of them has been made.

8. On December 16, 1942, plaintiff filed with the Secretary of State for the State of Vermont and with the Commissioner of Taxes for the State of Vermont the sworn statement provided for in Section 1008 of the Public Laws of Vermont (1933), reading as follows:

> We, JOSEPH T. SMITH, President and WARREN R. AUSTIN, Jr., Clerk of the Woodbury Granite Co., Inc., a corporation organized and existing under the laws of the State of Vermont and having its principal place of business at Burlington in the County of Chittenden and State of Vermont, hereby certify:
>
> That the obligations of said Woodbury Granite Co., Inc. to its creditors have been discharged by operation of law or otherwise; that all of the assets of said corporation remaining after the discharge of its obligations to creditors have been apportioned among its stockholders according to their respective rights (no assets remaining for that purpose); that claims or demands do not exist against such corporation; and that such corporation is

not the owner of real or personal estate located within this state or elsewhere.

Dated at Burlington, in the County of Chittenden, this 15th day of December 1942.

JOSEPH T. SMITH,
President.
WARREN R. AUSTIN, Jr.,
Clerk.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The facts in this case have been stipulated and are adopted by the Court as its special findings of fact.

It appears from the facts that there is due from the defendant $350 representing increased costs of performance due to enactment of the National Industrial Recovery Act. The right of recovery is statutory, Act of June 25, 1938, 52 Stat. 1197.

The sole defense is *nul tiel* corporation. This issue would ordinarily be raised by a special plea, absent in this case, under the rule that the issue raised by a general traverse admits capacity to sue, *United States* v. *Insurance Companies*, 22 U. S. 99, but this has been waived by stipulation.

The petition was filed on December 15, 1938, when the Woodbury Granite Company was still a corporation of the State of Vermont. On December 16, 1942, it filed with the Secretary of State for the State of Vermont and with the Commissioner of Taxes for that State a sworn statement, provided for in Section 1008 of the Public Laws of Vermont (1933), which statement is as follows:

> We, JOSEPH T. SMITH, President, and WARREN R. AUSTIN, Jr., Clerk of the Woodbury Granite Co., Inc., a corporation organized and existing under the laws of the State of Vermont and having its principal place of business at Burlington in the County of Chittenden, and State of Vermont, hereby certify:
>
> That the obligations of said Woodbury Granite Co., Inc. to its creditors have been discharged by operation

of law or otherwise; that all of the assets of said corporation remaining after the discharge of its obligations to creditors have been apportioned among its stockholders according to their respective rights (no assets remaining for that purpose); that claims or demands do not exist against such corporation; and that such corporation is not the owner of real or personal estate located within this state or elsewhere.

Dated at Burlington, in the County of Chittenden, this 15th day of December 1942.

The defendant contends that the Woodbury Granite Company, by virtue of this declaration, and of Section 1009 of the Public Laws of Vermont (1933), is no longer in existence.

Section 1009 reads as follows:

SEC. 1009. *Corporate functions cease.*—A corporation causing the sworn statement mentioned in the preceding section to be filed with the secretary of state and the commissioner as therein set forth, shall not thereafterwards, in this state or elsewhere, conduct or transact any corporate business, nor possess any corporate functions, except in case proceedings are instituted against such corporation by creditors or stockholders and then only for the purpose of adjusting the rights of such creditors or stockholders; and such corporation and all rights and privileges existing thereunder, except as set forth in this section, shall cease to exist.

The parties hereto are in apparent agreement that the corporation that brought this suit is not now in existence. That conclusion seems inescapable. No survivorship is provided for the purpose of prosecuting suits. Section 1009 says that with the filing of the statement the corporation shall not "possess any corporate functions," with certain exceptions not here relevant.

It was said in *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257, 259:

It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect * * *;

citing numerous cases.

In the case we have here we might go farther and say that the corporation is not now in existence. Certain it is that a non-existent person can no more sue than he can be sued. Here there is no entity in whose favor judgment may be rendered. Indeed the attorney for the petitioner is in a situation where his erstwhile principal is dead, so to speak. As was said in *Moore* v. *United States*, 26 C. Cls. 254, 255,

> * * * if authority to bring a suit be given by the party in interest and remain unexecuted, the power of course will expire with his death.

Those entitled to the judgment, if any there be, are not in court in their own proper persons or by attorney.

We know of no case in this court, and none in any other court has been cited, where a corporation, in existence when suit was instituted and going out of existence before judgment and not represented in court by assignee or liquidator, became even nominally a judgment creditor.

The only judgment possible under the circumstances is a judgment of dismissal.

The petition is therefore dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge*, took no part in the decision of this case.

EHRET MAGNESIA MANUFACTURING COMPANY v. THE UNITED STATES

[No. 44363. Decided March 5, 1945]

On the Proofs

Increased costs of material and labor under N. I. R. A. Act.—It is *held* that under the provisions of the Act of June 25, 1938, plaintiff is entitled to recover for increased cost of material used on Government contract and also for increased labor costs, which were due to the enactment of the National Industrial Recovery Act, and although evidence as to wage increases on the contract in question is not satisfactory as to the exact amount of such increases, it does show that they were not less than the amount for which recovery is allowed.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. Armistead B. Rood, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and at all relevant times was, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Valley Forge, Pennsylvania. It brought this suit under the Act of June 25, 1938 (52 Stat. 1197).

2. February 6, 1933, the defendant, acting through the Chief of the Bureau of Yards and Docks, Navy Department, entered into a contract with John McShain, of Philadelphia, Pennsylvania, whereby McShain, as prime contractor, undertook to construct a Naval Hospital and related buildings at Philadelphia, Pennsylvania.

3. March 30, 1933, McShain entered into a subcontract with Daniel J. Keating, Inc., whereby Keating, as subcontractor, undertook to install the plumbing and heating equipment for the Philadelphia Naval Hospital and related buildings called for by the prime contract of February 6, 1933, between the defendant and McShain.

4. May 29, 1933, plaintiff entered into a sub-contract with Keating whereby for the fixed price of $23,000 plaintiff undertook to furnish and install certain magnesia and wool felt pipe coverings and other insulating materials required in connection with the installation of the plumbing and heating equipment of the said Naval Hospital and related buildings in accordance with the plans and specifications under the prime contract of February 6, 1933.

5. On or about August 16, 1933, plaintiff signed a modified version of the President's Reemployment Agreement, which contained the following provisions of a proposed Code of Fair Competition for the asbestos industry:

> The undersigned hereby agrees with the President as follows:
>
> * * * * *
>
> (2) Not to work any accounting, clerical, banking, office, service or sales employees (except outside sales-

men) in any store, office, department, establishment, or public utility, or on any automotive or horse-drawn passenger, express, delivery, or freight service, or in any other place or manner, for more than 40 hours in any 1 week and not to reduce the hours of any store or service operation to below 52 hours in any 1 week, unless such hours were less than 52 hours per week before July 1, 1933, and in the latter case not to reduce such hours at all.

* * * * *

No factory or mechanical worker or artisan (except technicians who now receive more than $35.00 per week) shall be employed for an average of more than 40 hours a week, nor more than 8 hours in any one day (with a 10 percent tolerance for engineers, electricians, firemen, shipping, maintenance and watching crews); provided, however, that to meet seasonal requirements or emergencies manufacturers may work employees a maximum of 48 hours per week, but the weekly hours for each employee for any 8 weeks period will not exceed an average of 40 hours per week.

* * * * *

The wages that shall be paid in the Northern section[1] by any employer to any factory worker or mechanical workers or artisan (except learners during a six weeks' apprenticeship) shall be not less than 40 cents an hour, or $16.00 per week for 40 hours of labor.

* * * * *

In no case shall learners be paid less than 80 percent of the minimum wage; nor more than 5 percent of the total number of employees in any establishment be classed as learners.

It is agreed that this paragraph establishes a guaranteed minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on a piecework performance.

November 13, 1933, plaintiff became subject to a Code of Fair Competition for the asbestos industry, which contained the above provisions in revised version, but with no differences that are material to this case.

6. Plaintiff made its first delivery of materials for the Naval Hospital work under its sub-subcontract on September 18, 1933, and its last delivery on December 13, 1934.

[1] The work involved in this suit was in the "Northern section."

7. The construction of the Naval Hospital and related buildings was substantially completed, and the work accepted by the defendant, on February 4, 1935. April 26, 1935, within six months after completion of the prime contract, the prime contractor, on behalf of plaintiff, filed with the Navy Department a claim for increases in costs of materials and labor allegedly incurred by plaintiff in the manufacture and delivery of its products for the Naval Hospital contract, as a result of the enactment of the National Industrial Recovery Act.

8. Plaintiff furnished wool felt covering for the hospital contract. This commodity was purchased intact by plaintiff from other suppliers and furnished to the job without further processing. The price which plaintiff had to pay for this material was increased $714.99 as a result of the enactment of the National Industrial Recovery Act.

9. Plaintiff claims that its wage costs in performing its contract were increased as a result of the enactment of the National Industrial Recovery Act. The only figures in evidence showing actual wage increases were schedules of rates for hourly work and piece work which were in effect in plaintiff's plant during the following periods: (a) May through July, 1933; (b) August 1 to August 16, 1933; and (c) after August 16, 1933. These schedules do not list the employees by names, nor show the wage rates of particular employees who worked on the contract here involved. They show that, as a whole, wages in plaintiff's plant were increased 28% after the enactment of the National Industrial Recovery Act. In general, the August schedules show higher wage scales than the May schedule, and the enactment of the N. I. R. A. was an important contributing cause of the August revisions. Employees who had received wages below the N. I. R. A. minimum were increased up to the minimum, and some were increased above the minimum. Employees receiving identical wages before the N. I. R. A. did not all receive identical increases. For example, certain employees receiving 35 cents per hour under the May schedule were increased to 40 cents in August, while other 35-cent employees were increased to 45 cents

and still others to 50 cents. Some employees who had already received wages above the minimum were nevertheless increased. A computation based upon the assumptions that the percentage by which all wages in plaintiff's plant were increased, was applicable to the employees who worked on the contract here in question, and that all wage increases were the result of the enactment of the National Industrial Recovery Act shows such an increase of $448.48. Discounting this figure because of the lack of more specific proof, we find that plaintiff's wages were increased by $350 as a result of the enactment of the National Industrial Recovery Act.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues under the Act of June 25, 1938, 52 Stat. 1197, to recover increased costs which, it asserts, it incurred as a result of the enactment of the National Industrial Recovery Act, in performing a contract with a sub-contractor on a Naval Hospital at Philadelphia. The difficulties in the case are in connection with the sufficiency of the plaintiff's proof of the claimed increases.

The plaintiff purchased certain materials for use on its contract. One of these materials was wool felt covering. Under the N. I. R. A., a Code of Fair Competition for the asbestos industry was formed, and the plaintiff's Vice President, Du Bois, was a member of the Code Authority, its governing body. He testified that prices were quite rigidly fixed, under the Code, and that they were higher than they had been before, for wool felt covering. A Government auditor found that the discounts which the plaintiff got, on its purchases of this material, after the Code, were less by 5.085% than they had been before, and that this reduction of the discounts had increased the price of the wool felt covering for the work here involved by $714.99. We think this is adequate proof that the increase was a result of the enactment of the N. I. R. A.

Du Bois also testified as to increases in the prices of other materials which the plaintiff purchased for the job, but

these were not proved to have been subject to the Code with which he was familiar, or, in fact, to any code, and he did not purport to know the reasons for the increases. The plaintiff did not make available to the Government auditor any records relating to these other materials. We think the reasons for the increases in their prices have not been adequately proved.

The plaintiff claims that its labor costs were increased as a result of the enactment of the N. I. R. A. We have no doubt that they were. The plaintiff signed the President's Reemployment Agreement by which it agreed to bring all wages up to a specified minimum, and to make equitable adjustments in wages already above the minimum. At or just before the time it signed the agreement, it increased its wages, and it also made other, but not general, increases during the period of performance of the contract here involved. The work on this contract was only a small part of all the work which was being done in the plaintiff's plant. We have no evidence as to the wages of particular men who worked on the contract work, or as to whether such increases as they received were due to the N. I. R. A. or to other factors which are constantly causing wage changes in a plant such as the plaintiff's. By making the assumptions which we have stated in finding 9, we arrive at the figure $448.48 for the increased labor costs. This figure is, of course, not very trustworthy, and since the plaintiff has the burden of proof, we have reduced it to $350, a figure which, we are satisfied, is not more than the amount by which the plaintiff's labor costs were increased as a result of the enactment of the N. I. R. A.

The plaintiff is entitled to recover $1,064.99.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

GEORGE GOLDBERG AND MEYER GOLDBERG, COPARTNERS, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF EMPIRE VAULT CO. v. THE UNITED STATES

[No. 45516. Decided March 5, 1945]

On the Proofs

Government contract; failure of contractor to comply; defendant entitled to recover on its counterclaim.—Where plaintiffs entered into a contract with the Government for the construction and delivery of glass roof skylights to be installed on a W. P. A. project; and where it is shown that the plaintiffs failed to perform their contract and that after due notice the defendant secured the skylights from other sources, with the usual process of advertising and bidding, at a cost in excess of plaintiff's bid; it is *held* that plaintiffs are not entitled to recover and that the defendant is entitled to recover on its counterclaim.

The Reporter's statement of the case:

Mr. Louis Bloch for the plaintiffs.

Mr. Henry Weihofen, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The Court made special findings of fact as follows:

1. Plaintiffs are residents of New York City and are engaged as partners in the construction of roof and vault lights.

2. Pursuant to an invitation for bids dated December 1, 1939, and a bid submitted by plaintiffs in response thereto on December 8, 1939, plaintiffs and defendant on January 6, 1940, entered into a contract for the construction and delivery of six glass roof skylights at a unit price of $514, that is, a total of $3,084. Plaintiffs duly furnished a performance bond. The skylights were to be constructed for installation in a garage being built under the Work Projects Administration for the Department of Sanitation of the City of New York.

3. Pursuant to the contract a notice to proceed in the form of a purchase order was issued January 10, 1940. That order

contained the following provisions which were substantially identical with provisions in the contract:

> Vendor shall submit 8 copies of shop detail drawings and schedules within 10 calender days after receipt of order to the office of the Work Projects Administration
>
> 70 Columbus Ave.,
> New York City
> Circle 6-4000. Ext. 157
>
> for approval, and shall within 10 calendar days after approval, furnish 8 copies of approved drawings for record purposes.
>
> All drawings to state Title and Location of Job, Purchase Order, Inquiry, Requisition and Official Project Numbers.
>
> In the event that corrections are made by the Work Projects Administration on shop drawings submitted for approval, the vendor must make the corrections shown and resubmit the shop drawings for final approval within 3 calendar days after receipt by the vendor of the drawings showing the necessary corrections to be made.
>
> Complete delivery to be made within 45 calendar days after receipt of approved shop detail drawings by the vendor.
>
> The Government will not be responsible for any materials ordered by the vendor prior to the final approval of the vendor's shop drawings.

4. The work was required to be performed in accordance with specifications and contract drawings relating to the entire project, particular reference being made to contract drawings A-6 and A-14 which governed the construction of the roof on which the skylights were to be installed. One provision of the specifications read as follows:

> All work shall be constructed and fabricated in full accordance with the requirements of the New York Building Code, relating to this type of material. Panels shall be constructed to allow for a minimum Live Load of 50 lbs. per sq. ft.
>
> The Building Code of the City of New York requires that the method of construction of a particular contractor be approved by the Board of Standards and Appeals before construction. As an alternative, the Superintendent of Housing and Building of a particular Borough could grant specific approval of the

materials or method of construction for a particular job under certain circumstances, as distinguished from the blanket approval that could be obtained from the Board of Standards and Appeals.

The Board of Standards and Appeals granted approvals of materials and methods of construction only upon formal application therefor and only for the particular use to be made of the materials and construction. Approval of a particular method authorizes only the person named therein to employ it; under the Building Code, in order that another contractor be authorized to employ an approved method he would have to obtain a new approval or have the existing one amended to extend the authorization of its use to him.

5. Plaintiffs duly submitted to the Works Projects Administration their shop drawings for approval as required by the specifications. The Bureau of Architecture, Department of Public Works, New York City, had the responsibility of checking all shop drawings of work to be done on the Department of Sanitation garage for conformity with plans, specifications, and Building Code. When the Work Projects Administration submitted plaintiffs' shop drawings to the Bureau of Architecture, the latter agency disapproved them because plaintiffs' method of construction had not been approved by the Board of Standards and Appeals of New York City as required by the Building Code of New York City. Upon disapproval, it was explained to plaintiffs that it would be necessary for them to secure the requisite approval from the Board of Standards and Appeals.

The plaintiffs asked the Bureau to obtain for them the special dispensation of the Borough Superintendent of Housing and Building, authorized by Section 545a (2) of the New York City Charter, but such request was refused and the plaintiffs were told that they would have to make their own efforts to obtain such special approval.

Plaintiffs made no formal written application for approval of their materials and method of construction by the Board of Standards and Appeals and no such approval was granted. Plaintiffs' explanation of their failure to make such application was that they were of the opinion that the time required to obtain such approval would extend beyond the time given for carrying out the contract.

The plaintiffs herein were specifically instructed to obtain the approval of the Board of Standards and Appeals, but refused to follow such instructions because they feared the obtaining of such approval would delay them in the performance of their contract beyond the time specified in the contract. They never submitted their materials or methods of construction for such approval and such approval was never otherwise granted.

6. At or shortly after receipt of the purchase order dated January 10, 1940, and referred to in finding 3, plaintiffs examined the roof where the the skylights were to be installed and concluded that the steel framing in the roof had been set to receive a different type of construction from that manufactured by them, and that it would be impossible to install their construction and comply with the specifications under their contract. Plaintiffs made objections orally on account of the situation presented but filed no written protest. Whether the roof, with the steel framing, was in place when plaintiffs submitted their bid does not definitely appear from the record, but, in any event, plaintiffs did not examine the roof prior to such submission.

7. After the execution of the contract, plaintiffs purchased certain materials for use in carrying out the contract in the total amount of $516.57. At the hearing in this proceeding, proof of payment was shown to the extent of $384.57. In addition plaintiffs paid $7.71 for the performance bond.

8. February 14, 1940, defendant advised plaintiffs as follows:

> Reference is made to the subject purchase order calling for the delivery of six (6) skylights in accordance with the terms of the purchase order.
>
> You submitted drawings which were not acceptable to the Department of Public Works Bureau of Architecture because they failed to meet the requirements under Section 2.2.3 of the Building Code and Section C 26–191.0 of the Administrative Code as of February 2, 1940.
>
> You are notified that you must submit evidence of approval by February 23, 1940, that this material meets the requirements of the New York Building Code as mentioned above.

> In order to compensate for delays mentioned above, you are to make delivery within twenty (20) days after approval of drawings instead of the forty-five (45) days as specified in the purchase order, otherwise it will be necessary to refer the matter to the Procurement Division, U. S. Treasury Department, for them to buy the material in the open market and charge the same to the vendor's account.

March 1, 1940, defendant advised plaintiffs further as follows:

> Referring to the above mentioned purchase order, we wish to advise that due to your inability to furnish the material called for therein, it will be necessary for us to purchase this material in the open market, and if the lowest bid received exceeds the price shown on the above mentioned purchase order, the excess in cost will be charged to your account. Your surety has been advised of this action.

9. March 4, 1940, the defendant advertised for bids for furnishing the skylights called for by plaintiffs' contract embodying in such invitation for bids the same specifications which governed plaintiffs' contract. Pursuant to that invitation for bids a contract was entered into by defendant with another contractor on March 22, 1940, for the same items as called for by plaintiffs' contract. The items were duly furnished under that contract at a cost of $768.84 in excess of that set out in plaintiffs' contract. Demand has been made by the defendant on plaintiffs for that excess cost but payment has not been made.

The court decided that the plaintiffs were not entitled to recover, and the petition was dismissed. The court further decided that the defendant was entitled to recover on its counterclaim.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiffs entered into a contract with the defendant January 6, 1940, for the construction and delivery of six glass roof skylights. The skylights were for the installation in a garage being built under the Work Projects Administration for the Department of Sanitation of the City of New York.

The contract provided that the vendor (plaintiffs) should submit shop detail drawings for approval to the Work Projects Administration.

The contract further provided that plaintiffs' skylights should "be constructed and fabricated in full accordance with the requirements of the New York Building Code, relating to this type of material."

The plaintiffs duly submitted their detail shop drawings to the Work Projects Administration, who in turn submitted them to the Bureau of Architecture, Department of Public Works, New York City. This bureau disapproved them on the ground that the method of construction did not comply with the New York Building Code, in that the method did not have the approval of the Board of Standards and Appeals of New York City. It was explained to plaintiffs that it would be necessary for them to secure the requisite approval from the Board of Standards and Appeals.

Although being so informed the plaintiffs did not undertake to secure the approval of the Board of Standards and Appeals.

The record is somewhat obscure as to plaintiffs' reason for not applying for the approval. Whatever the reason, there is none given that prevented plaintiffs from going ahead and making the application. Extension of time for delivery might have been asked for, although in this respect the plaintiffs were told that their time for delivery would be 20 instead of the agreed 45 days after approval of the drawings, a shortening of time for which there appears to have been no authority.

Plaintiffs claim that the defendant so constructed the roof as not to take plaintiffs' style of skylight. But this is not material, as plaintiffs had only to comply with their own contract of construction and delivery, which did not include installation. The way in which the defendant constructed the roof was at its own risk.

The plaintiffs failed to perform their contract and after due notice the defendant secured the skylights from other sources, with the usual process of advertising and bidding.

Thereby the defendant was subjected to an excess cost of $768.84 over plaintiffs' contract.

We are of the opinion that plaintiffs cannot recover and that the defendant is entitled to recover $768.84 on its counterclaim.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

CHERRY COTTON MILLS, INC. v. THE UNITED STATES

[No. 45885. Decided March 5, 1945]*

On the Proofs

Taxes; refund of processing and floor stocks taxes properly set off against balance due to Reconstruction Finance Corporation.—Where the plaintiff is admittedly indebted to the Reconstruction Finance Corporation, a Government agency, for a balance due on the corporation's participation in a bank loan to plaintiff; and where the Government is admittedly indebted to the plaintiff for refund of processing and floor stock taxes paid by it under the Agricultural Adjustment Act; it is *held* that the amount due to the plaintiff for such refund was properly set off against the balance due by the plaintiff to the corporation, and the plaintiff is not entitled to recover.

Same; Reconstruction Finance Corporation is agent and trustee of the Government.—The Reconstruction Finance Corporation, created under the Act of January 22, 1932 (47 Stat. 5; U. S. Code, Title 15, sections 601–617), is an agent of the Government, a device for accomplishing the Government's purpose, with the Government's money; the Government's assets and credits stand behind the Reconstruction Finance Corporation's obligations, and the Reconstruction Finance Corporation's losses are the Government's losses; and debts owed to the Reconstruction Finance Corporation are owed to the Corporation as agent and trustee for the Government.

Same; the corporation's assets and claims are the assets and claims of the Government.—The legal capacities of the Reconstruction Finance Corporation to own property and to sue and be

*Plaintiff's petition for writ of certiorari granted.

sued are powers and capacities held by the corporation in trust for the benefit of one sole beneficiary, the Government; and looking through the trust, the assets and claims held by the corporation are, in substance and in equity, assets and claims of the Government, held separately from the other assets of the Government.

Same; decisions in the Menihan case and the Burr case are distinguished.—The decisions in *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, where it was held that the Reconstruction Finance Corporation is liable for costs, and in *Federal Housing Administration* v. *Burr*, 309 U. S. 242, where it was held that the Federal Housing Administration is subject to garnishment under State law for wages due to an employe, are distinguished, on the ground that in those cases the Supreme Court was only deciding to what extent Congress meant to waive immunity of the Government when it endowed these corporations with the capacity to sue and to be sued.

Same; waiver of sovereign immunity to suit in acts creating Government corporations and agencies.—Where the sovereign immunity from suit was waived by Congress in acts creating Government corporations and agencies, empowered to sue and be sued like private persons; it was not the intention of Congress that the sovereign's finances should be subjected to risks and inconveniences to which the finances of no private person are by law subjected.

Same; jurisdiction; judgment on defendant's counterclaim.—Although the Reconstruction Finance Corporation could not sue in the Court of Claims for the balance due it from the plaintiff, over and above the amount set off and credited to the plaintiff as a result of the judgment in the instant case, nevertheless since the plaintiff has, in the Court of Claims, sued the corporation's principal and beneficiary, which is the United States, so that the real parties are before the court; the court has jurisdiction to dispose completely of the claims of both parties against each other, and judgment is rendered against the plaintiff, and in favor of the defendant, on its counterclaim. *Crane, et al, Receivers*, v. *United States*, 73 C. Cls. 677, certiorari denied 287 U. S. 601; and *John Morrell and Company* v. *United States*, 89 C. Cls. 167, cited and reaffirmed.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Julian R. Wilheim*, *George E. Heidlebaugh*, and *S. R. Gamer* were on the brief.

The court made special findings of fact as follows, upon a stipulation entered into by the parties:

1. Plaintiff is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Alabama, having its office and principal place of business at Florence, Alabama.

2. Pursuant to an Application, dated October 7, 1935, by plaintiff to The First National Bank of Florence, Florence, Alabama (hereinafter called "the Bank") for a loan in the principal amount of not exceeding $110,000, to be evidenced by a note secured by certain collateral, with the understanding that the Bank would request the Reconstruction Finance Corporation (hereinafter called "the R. F. C.") to agree to purchase a participation in said note, the Bank agreed to lend plaintiff not exceeding $110,000, to be disbursed to plaintiff in deferred portions as requested of the Bank by plaintiff. The R. F. C. is a body corporate, created by the Act of January 22, 1932 (47 Stat. 5), as amended, whose entire capital stock is owned by the United States of America and whose management is vested by said Act in a board of directors consisting of five persons appointed by the President of the United States by and with the advice and consent of the Senate.

3. On January 30, 1936, for value received, plaintiff executed a note, payable to the Bank, promising to pay $110,000, with interest at 5 per cent per annum, payable semi-annually, with certain collateral as security and containing, *inter alia*, provisions for acceleration of maturity of said note and power of sale upon default of plaintiff with respect to the terms and conditions of said note.

4. On January 30, 1936, plaintiff entered into a mortgage with the Bank as mortgagee, which recites that plaintiff is indebted to the Bank in the principal sum of $110,000, with interest at 5 per cent per annum, payable semi-annually, as evidenced by plaintiff's note of January 30, 1936, and contains, *inter alia*, provisions for acceleration of the maturity of the debt and for foreclosure and power of sale by the mortgagee upon default of plaintiff with respect to the terms and conditions of said note and said mortgage, with power in said mortgagee to bid at such sale and purchase, if the

highest bidder, and power in said mortgagee or owner of the debt and the mortgage, or the auctioneer, upon such sale, to execute a foreclosure deed in the name of plaintiff, said mortgage being recorded in Vol. 259, pages 248–256, Lauderdale County, Alabama.

5. On or about February 5, 1936, pursuant to the Bank's application to the R. F. C. for an agreement to purchase a participation in plaintiff's note of January 30, 1936, the R. F. C. entered into a Participation Agreement with the Bank, providing that, upon the making of the loan, not in excess of $110,000, to plaintiff by the Bank, the R. F. C. agreed to purchase 66⅔ percent interest in plaintiff's note, evidencing such $110,000 loan to plaintiff by the Bank, on condition, *inter alia*, that the R. F. C. should receive said note, endorsed without recourse by the Bank to the R. F. C., and transfer of the mortgage of January 30, 1936, as required by Section III of a Resolution of October 16, 1935, of the Executive Committee of the R. F. C.

6. On February 5, 1936, as required by the Participation Agreement of the R. F. C., the Bank endorsed plaintiff's said note, which was delivered to the R. F. C., and also executed a Transfer of Mortgage, reciting that the Bank, for value received, "grants, bargains, sells, conveys, assigns, and delivers" to the R. F. C., its successors and assigns, all its right, title, and interest in the mortgage entered into by plaintiff on January 30, 1936, together with the debt there secured, the notes therein described, and the land and property therein conveyed, to have and to hold unto the R. F. C., its successors and assigns, forever, said Transfer of Mortgage being recorded in Vol. 260, pages 441–442, Lauderdale County, Alabama.

7. On March 2, 1936, following advice of a certificate of February 8, 1936, executed by the Federal Reserve Bank, Birmingham, Alabama, as Custodian of the R. F. C. and stating that all documents, including the endorsed note and Transfer of Mortgage, had been received from the Bank by said Custodian in satisfactory form, the R. F. C. executed, and delivered to the Bank, a Certificate of Interest, reciting that, as provided in the Participation Agreement, the Bank had made the loan to plaintiff, as evidenced by plaintiff's

note, and the R. F. C. had purchased the participation in said note and had received delivery of said note and the collateral and that the Bank had retained an interest in said note and the collateral so delivered, in a principal amount equal, at any given time, to 33⅓ percent of the unpaid principal amount of said note disbursed until such time.

8. By on or about August 15, 1936, all of the principal amount of the loan not exceeding $110,000 made by the Bank to plaintiff, to wit, $110,000, including the 66⅔ percent participation of the R. F. C. therein, was disbursed by the Bank to and received by plaintiff.

9. On March 25, 1939, upon and after default of plaintiff with respect to the terms and conditions of its note and mortgage of January 30, 1936, and after demand by the R. F. C. that plaintiff comply therewith, and pursuant to an Authorization of February 13, 1939, of the Executive Committee of the R. F. C. to accelerate the maturity of plaintiff's said note, and to take steps to foreclose all hypothecations of collateral securing the loan evidenced by said note, the R. F. C. served due and proper Notice of Acceleration of said note on plaintiff, receipt thereof being acknowledged by J. T. Flagg, plaintiff's president, on said date.

10. On July 12, 1939, there was due and owing from plaintiff to the R. F. C. and the Bank $108,194.06, of which 66⅔ percent or $72,129.38 was the share of the R. F. C. and 33⅓ percent or $36,064.68 was the Bank's share.

11. On July 12, 1939, foreclosure of plaintiff's mortgage of January 30, 1936, was instituted by the R. F. C. in the joint names of the R. F. C. and the Bank and, at the foreclosure sale, the R. F. C. and the Bank became joint purchasers of the property listed as collateral security for plaintiff's debt, the bid and purchase price being the sum of $100,000, and as the result of such foreclosure sale, the R. F. C. received a 66⅔ percent or $66,666.67 interest and the bank received a 33⅓ percent or $33,333.33 interest in the acquired property, as shown by a Foreclosure Deed executed in behalf of plaintiff by Crampton Harris as Auctioneer and Attorney in Fact on July 17, 1939, and recorded, on July 18, 1939, in Vol. 288, pages 206–212, Lauderdale County, Alabama.

12. Expenses incidental to said foreclosure sale, which were properly disbursed by the R. F. C. and the Bank and are properly chargeable to plaintiff under the terms and conditions of its note and mortgage of January 30, 1936, were incurred by the R. F. C. and the Bank in the sum of $751.19 and plaintiff has failed to reimburse the R. F. C. and the Bank therefor.

13. On July 12, 1939, after crediting plaintiff with the $100,000 purchase price paid for its property by the R. F. C. and the Bank on the foreclosure sale, there remained due and owing from plaintiff to the R. F. C. and the Bank $8,945.25, representing the unpaid balance of said Note plus said expenses incidental to said foreclosure sale, of which 66⅔ percent or $5,963.51 was the share of the R. F. C. and 33⅓ percent or $2,981.74 was the Bank's share. Plaintiff is, and since July 12, 1939, has been indebted to the R. F. C. in the amount of $5,963.51 plus interest at 5 percent per annum from July 12, 1939.

14. On February 5, 1942, following the filing of plaintiff's claim with the Collector of Internal Revenue for the District of Alabama for a refund of processing and floor stock taxes paid by it under the Agricultural Adjustment Act, which was allowed by the Commissioner of Internal Revenue in the amount of $3,104.87, a final closing agreement, under Section 506 of the Revenue Act of 1936, was accepted by the Acting Commissioner of Internal Revenue and, by letter of April 29, 1942, Deputy Commissioner of Internal Revenue Mooney advised plaintiff that, unless plaintiff was indebted to the United States Government, a check for such refund would issue to it.

15. On or about August 17, 1942, the Treasurer of the United States issued check No. 164,745, payable to plaintiff in the amount of $3,104.87, which check was stopped and recalled from plaintiff by telegram, dated August 26, 1942, of the Chief Disbursing Officer, Treasury Department, who informed plaintiff that the check should have been drawn to the order of the R. F. C. to liquidate partially the indebtedness of plaintiff to the R. F. C.

16. On September 2, 1942, after the return of said check by plaintiff, a reissued check, bearing the same number,

date, and amount and drawn to the order of the R. F. C., was transmitted to the R. F. C. by the Treasurer of the United States, said reissued check being in accord with Certificate of Settlement No. 0690274, dated August 11, 1942, of the General Accounting Office, which directed issuance of the check in settlement of plaintiff's claim for the refund to the R. F. C. to liquidate partially the indebtedness of plaintiff in the amount of $5,963.51, plus interest at 5 percent from July 12, 1939, due the R. F. C.

17. On September 2, 1942, the R. F. C. allowed plaintiff a credit or deduction of $3,104.87 in its accounts relating to plaintiff's indebtedness to the R. F. C. Plaintiff's said claim for a refund of processing and floor stock taxes paid by it under the Agricultural Adjustment Act was not at any time pledged, in whole or in part, by it as collateral security for its note and mortgage of January 30, 1936.

18. If the defendant was entitled to withhold said sum of $3,104.87 from plaintiff and to apply it as a credit or set-off to plaintiff's indebtedness to the R. F. C., the defendant is entitled to judgment against plaintiff for the sum of $2,858.64 plus interest at 5 percent per annum on $5,963.51 from July 12, 1939, to September 2, 1942, and also interest at 5 percent per annum on $2,858.64 from September 2, 1942, to date of judgment herein, together with interest at 6 percent per annum on such computed sum until the judgment is paid.

The court decided that the plaintiff was not entitled to recover.

The court further decided that the United States was entitled to recover against the plaintiff on its counterclaim the sum of $2,858.64 plus interest at 5 percent per annum on $5,963.51 from July 12, 1939, to September 2, 1942, and also interest at 5 percent per annum on $2,858.64 from September 2, 1942, to date of judgment, together with interest at 6 percent per annum on such computed sum until the judgment is paid.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff in 1936 made an application to The First National Bank of Florence, Florence, Alabama, for a loan of

$110,000, to be evidenced by a note secured by certain collateral, with the understanding that the bank would request the Reconstruction Finance Corporation to agree to purchase a participation in the note. As a result of the negotiations, as set forth at length in the special findings of fact, the plaintiff executed a note for $110,000.00, with interest at 5 percent per annum and mortgaged certain securities therefor. The bank made the loan secured by the mortgage and the R. F. C. purchased a two-thirds interest in the loan. There was a default by the plaintiff and the mortgage was foreclosed in 1939 and the mortgaged assets were bid in by the bank and the R. F. C. for $100,000.00, and the R. F. C. received a sixty-six and two-thirds interest and the bank the other thirty-three and one-third interest in those assets. There remained due to the R. F. C. and the bank in their respective interests of two-thirds and one-third, the sum of $8,945.25—$5,963.51 to the R. F. C. and $2,981.74 to the bank.

The plaintiff had paid processing and floor stock taxes as a cotton processor under the Agricultural Adjustment Act to the Collector of Internal Revenue for the District of Alabama in the sum of $3,104.87. The plaintiff, after the Agricultural Adjustment Act was declared unconstitutional, filed a claim for this amount, and a check dated August 17, 1942, was issued to it in payment of its claim. This check was stopped by the Disbursing Officer of the Treasury and, under the direction of the General Accounting Office, a check was issued to the R. F. C. in partial liquidation of the indebtedness of the plaintiff to the R. F. C., leaving a balance of $2,858.64 remaining due to the R. F. C. upon the debt of $5,963.51 which the plaintiff owed it.

No part of the processing and floor stock tax had been included in the collateral given to the bank or the R. F. C. to secure the original loan. Whether or not the plaintiff had paid the Florence Bank the $2,981.74 which it had owed the Bank since 1939, when this set-off was made, or has paid it since that time, we are not informed.

The foregoing recital shows the following facts: In 1942 the plaintiff was indebted to the R. F. C. in the sum of $5,963.51, and the Government was indebted to the plaintiff in the sum of $3,104.87. A check to pay the latter debt was

issued by the Government, but, before it was cashed, the plaintiff's debt to the R. F. C. came to the attention of the officers of the Government, and the check was recalled from the plaintiff and another check, for the same amount, payable to the R. F. C. was issued to and collected by the R. F. C. It credited the plaintiff with the payment of $3,104.87 upon the plaintiff's debt to it.

We think that the plaintiff should not, in these circumstances, have a judgment against the Government. The effect of the payment of such a judgment would be to cancel the credit which the R. F. C. has given the plaintiff upon its debt to it, and restore the plaintiff's debt to the R. F. C. to its former amount, $5,963.51. The plaintiff's net worth would be exactly the same as it is now, and, since its debt to the R. F. C. is long past due, it would be, as it has long since been, under a duty to pay the R. F. C. not only the $3,104.87 which it would recover from the Government, but enough more to discharge its debt in full to the R. F. C. If it did its duty in this regard, the $3,104.87 would then be, in effect, where it is now, i. e. among the assets of the United States. So our exercise of our functions would have been a sheer waste of the time and energy of ourselves and of those who have participated in this litigation on the part of the plaintiff and the Government. Only by assuming that the plaintiff will take the judgment money and will not pay its debt to the Government could we say that a judgment for the plaintiff had accomplished anything other than circumlocution, and, on this assumption, our accomplishment would seem to have been less than worthy of our effort.

The R. F. C. is an agent of the Government, a device for accomplishing the Government's purposes with the Government's money. The text of the statute creating the R. F. C., 47 Stat. 5, 15 U. S. C. 601–617, makes this plain. The Government's assets and credits stand behind the R. F. C.'s obligations, and the R. F. C.'s losses are the Government's losses. Debts owing to the R. F. C. are owed to it as agent and trustee for the Government. We use the word trustee since the R. F. C. does have the legal capacities of a separate legal person, to own property and to sue and be sued. But these powers and capacities are held by it in trust for the benefit of

one sole beneficiary, the Government. Looking through the trust, the assets and claims held by the R. F. C. are, in substance and in equity, assets and claims of the Government which are kept, for convenience, in a different receptacle from the one in which the Government keeps most of its money, viz., the Treasury.

Cases holding that the R. F. C. is liable for costs, as other litigants are, *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, or that the Federal Housing Administration is subject to garnishment under state law for wages due to an employee, *Federal Housing Administration* v. *Burr*, 309 U. S. 242, are not of significance in the solution of our problem. The Supreme Court in those cases was only deciding what Congress meant when it endowed Government corporations with the capacity to sue and be sued. It held that Congress intended that they could be sued like private persons, and that sovereign immunity from suit was waived. But no court has decided that Congress has shown any intention that the United States must pay out money to one who is indebted to it, through its agent and trustee, in a greater amount on a debt past due. That would not be a waiver of sovereign immunity, but a subjection of the sovereign's finances to risks and inconveniences to which no private person is by law subjected.

We do not regard as material the part which the General Accounting Office played in the transactions here in question. We think it was the duty of someone, on behalf of the Government, to see that this set-off was made. Whether the statute defining the functions of the Comptroller General lodged that duty there, or not, is a matter which would seem to be no concern of the plaintiff. It had no right to collect money from the United States when it owed a past due debt to the United States. How the Government, inside its own organization, took care that its right of set-off should not be overlooked, in its multiplicity of transactions, is not material. In short, we think that the money for which the plaintiff sues is now where it rightfully and lawfully belongs, and should stay there.

We have given the Government a judgment on its counterclaim for the balance, above the $3,104.87 already set off and

credited to the plaintiff, which the plaintiff owes the R. F. C. The R. F. C. could not have sued in this court for that balance. But the plaintiff has in this court sued the R. F. C.'s principal and beneficiary, the United States, so we have the real parties in interest before us. We see no reason why we should not, in the rational and economical administration of justice, dispose of their claims completely. When the plaintiff pays the United States the judgment which we have given the United States on its counterclaim, the plaintiff will, of course, have a complete defense against any claim by the R. F. C., and will not be concerned about how the Treasury and the R. F. C. record the transaction on their books.

In the case of *Crane, et al., Receivers*, v. *United States*, 73 C. Cls. 677, certiorari denied 287 U. S. 601, this court allowed the United States to recover a judgment on a counterclaim against a plaintiff who sued for the refund of taxes, and who had given a bond to the United States Shipping Board Emergency Fleet Corporation. It held that whether or not the Fleet Corporation was an entity separate from the United States was immaterial. The contract which the bond was given to secure, recited that the Fleet Corporation was representing and acting for and on behalf of the United States. In the case of *John Morrell and Company* v. *United States*, 89 C. Cls. 167, this court held that the fact that a contract made by the Federal Surplus Relief Corporation did not disclose that it was acting as the agent of the United States, was immaterial since the facts concerning its agency were apparent from the statute creating it, and from the known purpose of its organization. We think those cases were rightly decided.

The defendant may recover upon its counterclaim. Entry of judgment will be suspended to await the computation of the amount of the interest to be included in the judgment.

It is so ordered.

LITTLETON, *Judge;* and WHITAKER, *Judge*, concur.

WHALEY, *Chief Justice*, dissents.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion, and upon a stipulation of the parties showing the amount due thereunder, it was ordered April 2, 1945, that judgment be entered against the plaintiff and in favor of the United States on its counterclaim in the principal sum of $2,858.64 with interest thereon at 5 percent per annum from September 2, 1942, to April 2, 1945, amounting to $369.27, and interest at 5 percent per annum on $5,963.51 from July 2, 1939, to September 2, 1942, amounting to $937.82, a total judgment of $4,165.73, together with interest thereon at 6 percent per annum from April 2, 1945, until paid.

McCLOSKEY & COMPANY v. THE UNITED STATES

[No. 45649. Decided March 5, 1945]

On the Proofs

Government contract; decision of contracting officer final under the contract unless arbitrary or so grossly erroneous as to imply bad faith.—Following the decision in *Plumley* v. *United States*, 226 U. S. 545, and *McShain* v. *United States* (No. 43084), 308 U. S. 512, 520, it is *held* that the decision of the contracting officer was final under the terms of the contract where such decision was not arbitrary nor so grossly erroneous as to imply bad faith, and where no appeal was taken, as provided by the contract.

Same; contracting officer's decision correct in the instant case.—In the instant case it is *held* that not only was the contracting officer's interpretation of the plans and specifications not arbitrary nor so grossly erroneous as to imply bad faith but, upon the evidence adduced, the contracting officer's decision was correct, and the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. P. E. Edrington for the plaintiff.

Mr. D. B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Milton Kramer* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation and citizen of the United States, engaged in the building construction business, with its offices in the City of Philadelphia, State of Pennsylvania.

2. On July 31, 1939, plaintiff and defendant entered into a written contract whereby in consideration of $2,487,800 plaintiff agreed to furnish the material and perform the work for construction of the General Federal Office Building at Washington, D. C., together with Alternatives "A," "C," and "D," in accordance with the drawings, schedules, and specifications attached to and made part of the contract.

The work which is the subject of this lawsuit was subcontracted by the plaintiff to Mehring and Hanson Company, and by them again subcontracted to P. B. Polhemus Co.

3. Pursuant to provisions of the contract, notice to proceed was duly issued and plaintiff performed the contract work within the time specified and the defendant has paid to plaintiff the contract price.

4. Plaintiff's bid and the contract included alternate "A" as follows:

> ALTERNATE A. For the finishing complete of spaces allotted to CAFETERIA in ground floor and the furnishing and installation of all equipment in connection therewith as shown and specified.

The contract, in part, provides as follows:

> ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.
>
> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written ap-

peal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 3–41 of the specifications provided:

> *Interpretations.*—The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The Assistant Director of Procurement, Public Buildings Branch, is the duly authorized representative of the contracting officer.

5. Drawings CE–476 and No. 218 were furnished plaintiff for its information in bidding. On drawing *No. CE–476* in the lower right-hand side is the following provision:

> All items indicated and shown on this drawing are included in Alternate "A" excepting only those specifically excluded by notes * * *.

On this drawing is shown on the lower right-hand side "Cafeteria and Kitchen Equipment" and under the heading, "Equipment Identification," a list of equipment numbered from 1 to 73, inclusive. No. 72 of this list is, "back counter." Shown at the top of this drawing, introduced in evidence as defendant's exhibit No. 1, indicated by yellow coloring, is the back counter identified as No. 72. Indicated by coloring in yellow on this drawing are also 16 back counters which bear no number, but which are designated on the drawings by these words, "Line of back counters," with an arrow leading from these words to the drawings of the counters.

Paragraph 53–35 of the specifications refers to "counters behind serving counters and back counters." It reads as follows:

> 53–35. Counters behind serving counters and back counters shall be constructed of polished metal with galvanized pipe standards with adjustable ball feet and shall have under shelves and backs. Metal gauges and support sizes as well as general construction shall be as specified under "Tables—Generally." Backs will be required and must be of polished metal, counters more than 10 feet long shall be built in 5-foot sections.

Where counters ends butt against columns or other masonry surfaces such ends must have backs. Lengths of counters are indicated on drawings. Designs generally are indicated on Drawing No. 219. Widths shall not exceed 24 inches and must be flush with column faces.

Paragraph 53–261 relates to "Item 72," back counter, shown on the plans and designated by the number "72." This paragraph reads as follows:

> 53–261. *Item 72, one (1) back counter.*—This shall be constructed as specified under "Counters, etc., Generally" and "Tables—Generally" except that the design shall follow Drawing 219. The length shall be about 12 feet. All exposed faces except doors shall be of polished metal.

6. Plaintiff duly entered upon the performance of the work under the contract and in due course submitted to the defendant's appropriate representative its shop drawings for the kitchen and cafeteria equipment. The representative of the contracting officer returned the drawings to plaintiff with corrections requiring the installation of the back counters in question. Plaintiff orally protested that under the provisions of the contract and specifications it was not required to furnish the additional counters and under date of October 31, 1939, presented to Federal Works Agency a proposal for performing this work. This bill amounted to $6,596.03 for the sub-subcontractor who manufactured the counters and installed them, plus 10% overhead and commission for plaintiff, making a total of $7,255.63. This amount purported to cover expenses of the contractor, plus overhead and commission.

7. The assistant to the supervising engineer, following departmental practice in such instances, appointed two engineers to examine the question and advise him of their opinion. They reported under date of November 2, 1939, that in their opinion the claim was without merit. The assistant to the supervising engineer concurred in this opinion, and on November 13, 1939, the defendant, by the representative of the contracting officer, replied to the plaintiff's letter of October 31, 1939, rejecting its proposal on the ground that

drawing CE–476 and the specifications included the counters as a contract item, stating in part as follows:

> Your proposal is rejected, it being considered that your statement that "* * * back counters are now required in connection with a number of items which were not originally specified * * *" is incorrect. You failed to show the back counters on the shop drawings submitted. This omission was noted on the drawings returned to you. These appear to be the same back counters for which you now claim compensation.
>
> The note A on drawing CE–476 as follows is clear:
>
> "All items indicated and shown on this drawing are included under alternate A excepting only those specifically excluded by notes and except all drainage piping below ground floor."
>
> There are no notes on the drawings or in the specifications excluding the counters in question and the work should be installed as indicated on the approved and corrected shop drawings, as a contract requirement.

8. On January 12, 1940, plaintiff advised the defendant that the manufacturer of the equipment would proceed with the installation of the counters under protest and intended to reopen and request further consideration of the claim.

Under date of January 24, 1940, plaintiff wrote Federal Works Agency enclosing copies of a letter of P. B. Polhemus Co. dated January 16, 1940, addressed to Mehring & Hanson, in which Polhemus Company stated:

> In order that you may have a statement of our position which you may desire to present to the Procurement Division, with such thought as you may have in the matter, we set forth below some of the reasons why no Back Counters (except Item #72) were included in our estimate and why we are satisfied that the plans and specifications do not call for them.
>
> 1. Section 53 of the Specifications at paragraph 53–2 at page 259 provides:
>
> "For general location of equipment and details of cafeteria finish see the various drawings. The numbers appearing on the several pieces of equipment serve to identify equipment and locations of the same on the drawings."
>
> While 73 items of equipment are "identified" by numbers, the Back Counters are not identified by number as required equipment. The cost of these Back Counters

would be between 15% and 20% of all of the 73 items listed and numbered.

2. Drawing CE-476 includes 73 items under the heading of "Equipment identification" with the subscription entitled "Cafeteria and Kitchen Equipment." This list of 73 items of equipment includes Item 72 "Back Counter." This Back Counter is definitely described on Page 284 of the specifications and is included in our contract. This list of Cafeteria and Kitchen Equipment does not mention any other Back Counters. Inasmuch as the Back Counter numbered 72 is specifically mentioned in the equipment, it seems clear that other Back Counters would have been listed in the equipment if it had been intended that they be included in the list upon which we were asked to bid.

3. Drawing CE-476 has a legend printed on the lower right side to the effect that "all items indicated and shown on this drawing are included in Alternate 'A' except, etc." This is clearly an afterthought in an attempt to include any items not properly identified by the plans and the specifications. But the Back Counters are not "indicated" as required equipment since they are neither numbered nor included in the items listed.

4. Drawing CE-476 identifies 73 items of equipment. Each one of these 73 items is numbered on the plans. Each one of the 73 items is the subject of one or several paragraphs in the specifications under the item number, setting forth the specific details of these items of equipment. No other items of equipment are included in our contract and no other items are called for by the plans and specifications except item of Gates, the specifications of which are set up in detail following Item 73 indicated on the plans. While Back Counters are mentioned in the general specifications, failure to include them in the items of equipment listed or to number them for the purpose of identification, as being included in equipment desired, seems to effectively exclude these back counters from Cafeteria and Kitchen Equipment, submitted for the purpose of receiving bids. This is particularly so because of the fact that these counters might be reserved for future acquisition and are not necessarily essential to the operation of the Cafeteria.

5. Where 73 Items of Cafeteria and Kitchen Equipment are listed, the cost and importance of any one of which is far less than that of a series of Back Counters, and where each one of the 73 listed items is numbered

on the drawings and where the Back Counters are not listed with the 73 items of equipment and are not numbered on the drawings, and where the Back Counters are not described in detail in the specifications in the same manner as all of the other 73 items and one additional unnumbered item, it is reasonable to assume that the Back Counters are not included in the equipment upon which bids are sought.

We have reexamined the Plans and Specifications with great care, have called upon others familiar with such Plans and Specifications, and have consulted Counsel. We are convinced that our omission to estimate and to include in our price the cost of the Back Counters was not an oversight but according to a fair interpretation of the Plans and Specifications. We are, therefore, furnishing these Back Counters not as a part of our contract but outside of the contract.

9. The Acting Commissioner of Public Buildings replied to plaintiff under date of February 7, 1940, in part as follows:

A complete review of all of the information furnished by your subcontractors has been made with the following results:

The counters in question are clearly shown on drawings and are described generally in paragraphs 53–33 to 53–35 of the specifications wherein reference is also made in paragraphs 53–37 to 53–43 of the specifications for further details of construction. All details and information necessary for the construction of the counters are given.

Paragraphs 53–1 and 53–2 provide for the furnishing, setting and piping extensions of all the cafeteria and kitchen equipment, including plumbing and heating, ventilating and refrigeration work in connection with same, as shown on the drawings and as specified, and refers to the various drawings for the general location of the equipment.

Note on drawing CE–476 provides that all items indicated and shown on that drawing are included in alternate A, excepting only those specifically excluded by notes and except all the drainage piping below the ground floor. The counters in question are shown on this drawing and there is nothing on this or any of the other drawings, or in the specifications, indicating that they are not to be furnished.

The interpretation contained in office letter of November 13, 1939, is therefore sustained.

10. Plaintiff, March 7, 1940, gave notice to the defendant of its intention to appeal the decision of the Acting Commissioner of Public Buildings. Other correspondence followed.

Under date of July 26, 1940, the Commissioner of Public Buildings (the contracting officer) authorized the supervising engineer (who was a representative of the contracting officer) to act in all cases as his representative in deciding questions of the interpretation of drawings and specifications and to communicate such decisions directly to the contractor, and suggested the establishment of a Board of Contract Review composed of three persons of experience to examine questions and to make recommendations to the supervising engineer. Such board was appointed and the instant claim was referred to said board. On September 11, 1940 the board reported its conclusion to the supervising engineer to the effect that plaintiff's claim was not justified. This report was considered by the supervising engineer who concurred in the report on September 18, 1940.

11. September 25, 1940, Neal A. Melick, Supervising Engineer, rejected plaintiff's claim, in the following letter:

> Office letters of November 13, and February 7, interpret the contract as requiring you to furnish these back counters. A thorough investigation of the matter has been made by this office in which consideration was given to all of the information submitted with the letter of May 22, referred to above. It was found that the back counters are, as previously stated, not listed under the caption "Equipment Identification" nor are they given a number in the specifications to identify them.
>
> However, the counters in question are indicated in plan on drawing CE-476 entitled "Cafeteria and Kitchen Equipment" and again in plan on architectural drawing No. 218 entitled "Plan of Cafeteria and Kitchen, Alternate A" and a number of the counters are shown on architectural drawing No. 219 entitled "Details of Cafeteria and Kitchen, Alternate A."
>
> Drawing CE-476 has the following note in two conspicuous locations with arrows: "Line of Back Counters." This drawing also has the following note which is quoted in full:
>
> "All items indicated and shown on this drawing are included in Alternate 'A,' excepting only those specifi-

cally excluded by notes and except all the drainage piping below ground floor."

Referring again to drawing 219, all of the counters indicated on plan for the entire length of the main cafeteria serving counters are shown in elevation, specifically referred to as metal counters and indicated in detail and dimensioned. Immediately adjacent to and forming a part of the back counter equipment are two ice cream counters specifically noted "not included in the contract."

There is no note on any of the drawings above referred to excluding from the contract the furnishing of these counters.

The back counters and counters behind serving counters are clearly shown and dimensioned on the plans and are covered in specifications, paragraph 53–35, which reads as follows:

"Counters behind serving counters and back counters shall be constructed of polished metal with galvanized pipe standards with adjustable ball feet and shall have under shelves and backs. Metal gauges and support sizes as well as general construction shall be as specified under 'Tables—Generally.' Backs will be required and must be of polished metal, counters more than 10 feet long shall be built in 5-foot sections. Where counter ends butt against columns or other masonry surfaces such ends must have backs. Lengths of counters are indicated on drawings. Designs generally are indicated on drawing No. 219. Widths shall not exceed 24 inches and must be flush with column faces."

The fact that all items of equipment are described in detail in the specifications (53–44 to 53–265, inclusive) cannot be interpreted as excluding from the contract the counters in question which are described elsewhere (53–35) in the division of the specifications entitled "Kitchen and Cafeteria Equipment" (Alternate A), nor can it be assumed that the counters in question so clearly and fully shown on the plans are excluded from the contract when there is no note on the plans indicating such exclusion.

It is considered therefore that your claim for additional compensation for these counters is not justified.

12. November 25, 1940, plaintiff addressed a letter to the contracting officer, Public Works Administration, Federal Works Agency, reviewing the correspondence and action taken by various representatives of the defendant and re-

quested that the contracting officer himself give consideration to the case. In this letter plaintiff further states:

> The claim is in the sum of $6,915.44 instead of $7,255.63 as stated in our first proposal dated October 31, 1939, by reason of our subcontractor's claiming the actual cost of the extra equipment furnished, justification for which we can supply you.

On June 5, 1941, the Commissioner of Public Buildings, who was the contracting officer, advised plaintiff that after full consideration the previous decision was confirmed.

13. Under date of June 11, 1941, plaintiff wrote to the contracting officer in which it stated:

> This matter had not heretofore received the consideration of the official named in the contract to make decisions and your action thereon as expressed in your acknowledged letter is the only action in the matter so far taken by you in your capacity as contracting officer.
>
> The claim involves a mixed question of fact and law and while the contract gives you authority to make interpretations of the drawings and specifications, the contract requires that you ascertain the facts and make a finding of facts upon which your interpretation and decision are made.
>
> We wish to appeal to the head of the department but cannot do so unless you communicate to us a copy of your findings upon which we can base our appeal.
>
> Will you, therefore, kindly furnish us with a copy of your findings as required by the contract.

June 27, 1941, plaintiff again wrote the Federal Works Agency as follows:

> Receipt is acknowledged of your letter of June 24, 1941, denying our claim for additional compensation in connection with the installation of underfloor duct system in the General Federal Office Building, Washington, D. C. Reference is also made to our letter of June 11, 1941, requesting certain information involving our claim for compensation for certain back counters installed by us in the cafeteria of the General Federal Office Building.
>
> We request that our letter of June 11, 1941, and request for a copy of your findings, be considered as withdrawn. Inasmuch as this, together with your decision of June 24, 1941, disposes of all questions in connection with our

contract, we request that final settlement on this project be expedited.

This letter was acknowledged under date of July 1, 1941, as follows:

> Receipt is acknowledged of your letter of June 27, in which you formally withdraw your communication of June 11, requesting certain information involving your claim for compensation for certain back counters installed by you in the cafeteria of the General Federal Office Building.
>
> It is considered, therefore, that this obviates any further action on this item and consideration will be given to final settlement of your contract.

14. On September 27, 1941, the final voucher was prepared and certified to by the plaintiff as a correct and just statement. No statement of protest or reservation of claim was made, and the balance due was certified by the plaintiff as $35,485.42. This has been paid.

15. The contracting officer gave full consideration to plaintiff's claim and his determination was not arbitrary nor in bad faith.

The court decided that the plaintiff was not entitled to recover.

Whitaker, *Judge* delivered the opinion of the court:

Plaintiff sues to recover the sum of $6,915.44, the cost of installing back counters in the cafeteria of the General Federal Office Building in Washington, District of Columbia. It claims they were not called for by the plans and specifications. The contracting officer ruled that they were.

After receipt of his ruling plaintiff at first requested that he make findings of fact so that an appeal might be taken to the head of the department, but this request was later withdrawn and no appeal was taken. In such case, under paragraph 3-41 of the specifications, the contracting officer's finding is conclusive, if not arbitrary or so grossly erroneous as to imply bad faith. This paragraph reads:

> *Interpretations.*—The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall

be final. The Assistant Director of Procurement, Public Buildings Branch, is the duly authorized representative of the contracting officer.

See *Plumley* v. *United States*, 226 U. S. 545; *McShain* v. *United States*, 308 U. S. 512, 520.

The commissioner found that the contracting officer gave full consideration to plaintiff's claim and that his determination was not arbitrary nor in bad faith. Plaintiff took no exception to this finding. It is well supported by the record.

Careful consideration was given to plaintiff's claim. The Assistant Supervising Engineer appointed two engineers to examine the claim and advise him as to its merits. They reported on November 2, 1939, that it was without merit. The Assistant Supervising Engineer concurred and so notified plaintiff. On January 24, 1940, plaintiff wrote the defendant again presenting further arguments in support of its claim. The Acting Commissioner of Public Buildings replied on February 7, 1940, further discussing the claim and confirming the former ruling. Upon receipt of further communications from plaintiff the matter was referred to a Board of Contract Review. On September 11, 1940, this Board reported that the plaintiff's claim was without merit and plaintiff was so notified by the Supervising Engineer in a letter dated September 25, 1940, which set out further reasons for the rejection of the claim. The plaintiff, still dissatisfied, on November 25, 1940, addressed a letter to the Public Works Administration, Federal Works Agency, requesting that the contracting officer himself give consideration to the matter. The contracting officer on June 5, 1941, advised plaintiff that after full consideration the previous decision was confirmed.

We think his decision was correct. Drawing CE-476, which sets out the cafeteria and kitchen equipment, shows plainly the back counters in question. They are designated on the plans as follows: "Line of back counters," with an arrow from these words pointing to the drawings of the counters. The plans state plainly that "All items indicated and shown on this drawing are included in Alternate A excepting only those specifically excluded by notes * * *." The back counters were not excluded by notes.

The only basis whatever for plaintiff's claim is the following: The plans under the heading "Equipment Identification" lists 73 items of kitchen equipment, item 72 of which is a back counter. This back counter is not one of the back counters designated by "Line of back counters," and it is the only back counter bearing the number "72." The back counters designated on the plans by "Line of back counters" bear no numbers. Then in the specifications under paragraph 53–261 there is given the specifications for "Item 72, one (1) back counter." Plaintiff says that since the plans list the kitchen equipment on the plan and give each a number, and since only one back counter bears the number 72, and the specifications mention only one, only one was required to be built.

This is not correct. The specifications for the back counter numbered 72 and the other back counters are different. Those for the one numbered 72 are contained in paragraph 53–261; those for the others, in paragraph 53–35. In the latter paragraph are set out the specifications for "counters behind serving counters and back counters." Since they were different sorts of back counters, they could not have been given the same number. No number was given the sixteen in question, but they were plainly designated by the words, "Line of back counters," with arrows leading from these words to the drawings of the counters. They were not excluded by a note and were plainly called for.

Not only was the contracting officer's interpretation of the plans and specifications not arbitrary nor so grossly erroneous as to imply bad faith, but it seems to us to be the correct one.

It results that plaintiff is not entitled to recover and its petition, therefore, will be dismissed. It is so ordered.

Madden, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

J. ALLEN SMITH & COMPANY, INC. v. THE UNITED STATES

[No. 45884. Decided March 5, 1945]

On the Proofs

Dividends tax under National Industrial Recovery Act; date of declaration.—Where directors of taxpayer, a corporation, on July 17, 1933, adopted a resolution authorizing the officers of the corporation to pay dividends quarterly during the fiscal year, as the earnings and financial condition of the corporation in the judgment of the officers might justify; and where the amounts of the last two payments made in accordance with the resolution, on March 31, 1934 and June 30, 1934, were not fixed until shortly before those dates; it is *held* that the dividends were not "declared" until the latter dates and were not taxable under Section 213 of the National Industrial Recovery Act (48 Stat. 195, 209), inasmuch as the dividends tax imposed by Section 213 terminated on December 31, 1933, in accordance with Section 217 (c) of the N. I. R. Act.

Same; test prescribed by Treasury Regulations as to date of "declaration" of dividend.—The resolution of the board of directors, adopted July 17, 1933, authorizing the payment of dividends in the discretion of the officers of the corporation, created no debt to the stockholders; was no more than a delegation of authority to the officers to exercise, within specified limits, the discretion normally exercised by the directors, and did not meet the test of the Treasury Regulations as to when a dividend was "declared" within the meaning of the statute.

Same; no estoppel arising from decision in prior case.—The decision in the case of *J. Allen Smith & Co.* v. *The United States* (No. 44780), 93 C. Cls. 227, where the same plaintiff sued to recover the dividends tax collected from it for dividends paid in 1933, pursuant to a resolution of its board of directors in 1932 identical with the 1933 resolution involved in the instant case, does not give rise to an estoppel, since the decision in the prior case was based on a stipulation of the parties that the dividends then in question were "declared" in 1932, prior to the incidence of the dividends tax, and since the question concerning the 1934 dividends was in controversy, in the instant case, when the stipulation was entered into.

The Reporter's statement of the case:

Mr. Scott P. Crampton for the plaintiff. *Mr. Geo. E. H. Goodner* was on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Maine corporation with its principal place of business in Knoxville, Tennessee, where it is engaged in the flour milling business. It keeps its books and files its Federal income tax returns on the accrual basis for fiscal years ending June 30.

2. On July 17, 1933, plaintiff's board of directors adopted the following resolution:

> Resolved, that the Officers of the Corporation be, and are hereby authorized to pay dividends on the common capital stock of the Corporation not to exceed twenty-five percent, during the present fiscal year as the earnings and financial condition of the Corporation, in their judgment may justify.
>
> It is the sense of this meeting that if practicable the dividends authorized above be paid in 2½% quarterly payments, in September, December, March, and June, and any additional amount up to the amount authorized, at such time as the Officers may deem best.

3. Pursuant to the resolution set out in the preceding finding, the officers of plaintiff held informal conferences at various times during the fiscal year ended June 30, 1934, to discuss the payment of dividends. At those conferences, after considering plaintiff's operating statement for the preceding three months, the officers decided on the amount of dividends to be paid on each occasion. For the purpose of such payments no directors' meetings were held or resolutions adopted by the directors other than the resolution referred to in finding 2. In the foregoing manner in the last half of 1933 and first half of 1934, the officers of plaintiff pursuant to the resolution of July 17, 1933, determined that the earnings and

financial condition of plaintiff justified the payment of dividends on the dates and in the amounts following:

October 12, 1933	$10,000
December 30, 1933	30,000
March 31, 1934	20,000
June 30, 1934	30,000

Plaintiff paid dividends to its stockholders on the dates and in the amounts above recited.

4. Plaintiff filed dividend tax returns (Form 1043) covering the distributions made by it on October 12, 1933, and December 30, 1933, and paid the dividend tax imposed by Section 213 of the National Industrial Recovery Act on the $40,000 which it distributed on those dates. The dividend tax for 1933 was deducted from the distribution made to the stockholders in 1933 on those payments.

5. December 5, 1933, the President of the United States proclaimed the repeal of the Eighteenth Amendment to the Constitution.

6. All of the stockholders of plaintiff in the period from January 1, 1934, to June 30, 1934, inclusive, filed their personal Federal income tax returns on the calendar year basis.

7. Plaintiff did not file any dividends tax return for the six months ending June 30, 1934, and did not withhold any tax from the dividends declared and paid in that period, as set out in finding 3, but it did disclose the payment on March 31, 1934, and June 30, 1934, of those dividends in its income tax return for the fiscal year ended June 30, 1934, which return plaintiff filed on September 14, 1934.

8. May 31, 1940, the Commissioner of Internal Revenue assessed against plaintiff a dividend tax of $2,500 on the two dividend distributions totaling $50,000 made on March 31 and June 30, 1934, together with a penalty of $625 and interest of $875, that is, a total assessment of $4,000. On demand of the collector, plaintiff paid that assessment on August 17, 1940, together with interest of $49.84, making a total payment of $4,049.84. That tax on the 1934 dividends was paid by plaintiff out of its own funds and no charge or deduction was made by plaintiff against its stockholders with regard to the payment.

9. October 1, 1941, plaintiff filed a claim for refund of the tax, interest, and penalty of $4,049.84 which was paid as set out in the preceding finding. The claim set out the following grounds therefor:

> 1. The tax imposed by Section 213 applied only to dividends required to be included in income by the Revenue Act of 1932. That act was terminated on December 31, 1933, by the Revenue Act of 1934, and could not govern dividends received in March and June, 1934.
>
> 2. The tax imposed by Section 213 did not apply to any dividends paid or declared after January 1, 1934, because of the President's proclamation on December 5, 1933, of the repeal of the eighteenth amendment. Since the dividends which were taxed were finally determined and paid in 1934, they were not subject to tax.
>
> 3. The tax in question was assessed more than four years after it became due and collection was, therefore, barred by the statute of limitations.
>
> 4. Even if it be held that claimant was liable for the tax, it should not be held liable for penalties and interest when the Commissioner was on notice that said dividends had been distributed in 1934 and waited until May 1940, to advise claimant that it owed the dividends tax thereon.

The claim for refund was rejected by the Commissioner December 22, 1942.

10. No part of the tax, interest, or penalty referred to in the proceeding finding has been refunded to plaintiff or its stockholders. Plaintiff has borne the burden of the tax involved in that it did not withhold it from dividends paid to its stockholders nor has it been otherwise reimbursed therefor.

11. In the case of *J. Allen Smith & Co.* v. *United States*, 93 C. Cls. 227, the parties filed a stipulation in this court which said that the plaintiff in that case declared a dividend on July 19, 1932. The action which was taken on July 19, 1932, and which was thus stipulated as having been a declaration of a dividend, was the adoption by the Board of Directors of the plaintiff in that case, which is the plaintiff in the instant case, of a resolution identical in words with the resolution of July 17, 1933, quoted in finding 2.

12. Plaintiff is the sole owner of the claim here sued upon and has the consent of its stockholders to claim and receive the refund sued for herein. No transfer or assignment of

any part of the claim has been made and no action other than indicated above has been had thereon.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover a dividends tax and accompanying interest and penalties paid by it. It makes two principal contentions in support of its suit. It claims that it did not owe the tax because, it contends, the dividends taxed were not declared until after December 31, 1933, at which time the tax in question ceased to operate except with respect to dividends declared before that date. It also contends that, even if the tax had been properly owing, it was assessed and collected after its collection was barred by the statute of limitations.

The dividends taxes here in question were imposed under Section 213 of the National Industrial Recovery Act. 48 Stat. 195, 209. Section 217 (c) provided:

> The tax on dividends imposed by section 213 shall not apply to any dividends declared on or after the 1st day of the calendar year following the date so proclaimed.

The reference to the "date so proclaimed", as here applicable, was to Section 217 (a) (2) of the act, which made it the duty of the President to proclaim the date of the repeal of the eighteenth amendment to the Constitution. The President proclaimed December 5, 1933, as the date of repeal, so that if the dividends here in question were declared on or after January 1, 1934, they were not taxable.

The facts as to the declaration of the dividends appear in findings 2 and 3. Our question is whether the dividends were "declared" on July 17, 1933, when the directors adopted the quoted resolution, or on the two occasions shortly before March 31 and June 30, 1934, when the officers of the corporation met informally and decided on the amounts of the dividends to be paid. We think the dividends were not declared, within the meaning of Section 217 (c) until the officers' decisions were made in 1934.

The Bureau of Internal Revenue in its regulation interpreting the dividends tax statute, I. T. 2744, XII-2 Comulative Bulletin 402, said:

> In order for a dividend to be fully "declared" within the meaning of the statute the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stockholder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable. A dividend so declared of course effects an appropriation of surplus to the payment of the debt thereby created.

This is the conventional test for determining when a dividend has been declared, 11 Fletcher, Cyclopedia of Corporations, § 5322, and the test which, we suppose, Congress had in mind. The resolution of the board of directors did not satisfy that test. It created no debt to the stockholders. It was no more than a delegation of authority to the officers to exercise, within specified limits, the discretion normally exercised by the directors. The dividends were not, therefore, declared before January 1, 1934, and were not taxable under the National Industrial Recovery Act.

The Government urges that the facts embodied in our finding 11 and in the transcript of our former case, *J. Allen Smith & Co.* v. *United States*, 93 C. Cls. 227, should prevent the plaintiff from recovering in this case. In that case this same plaintiff sued to recover the dividends tax collected from it for dividends paid in 1933, pursuant to a resolution of its board of directors in 1932 identical with the 1933 resolution involved in this case, and action of its officers in 1933 similar to their action, in 1934, involved in this case. If the dividends paid in the first half of 1933 had been declared in 1932, when the directors adopted their resolution, then the dividends tax did not apply to them, since by the express language of Section 213 (a) it did not apply to dividends declared before the date of the enactment of the Act, which date was June 16, 1933. After a short hearing before one of the judges of this court, sitting as a commissioner, the parties filed a stipulation of the facts, in which it was stated that the dividends taxed in that case were declared in 1932. The court, having

no other facts before it, held that the dividends were not taxable, as, under the stipulated facts, and the applicable statute, they were not.

The Government now contends that, as a result of the colloquy between counsel which took place at the hearing in the other case, Government counsel, when they entered into the stipulation in that case, supposed that the plaintiff would take the position that the dividends which were paid in 1934, after the identical resolution of the Board of Directors in 1933, were declared in 1933. The question concerning the 1934 dividends, involved in the instant case, was then in controversy, and the parties, when they stipulated the facts of the earlier case, were aware of those of this case. The colloquy between counsel did not express or imply an agreement that the plaintiff would take the position that the dividends now in question were declared in 1933. The plaintiff, in the earlier case, asserted several grounds for refund of the tax there in question, and the stipulation as to when the dividends were declared related to only one, though the most important one, of those grounds.

The Government concedes that the facts recited above do not give rise to an estoppel, in the ordinary sense of that expression. We think that our impression that the Government would have won the other case, if it had not made an improvident and erroneous stipulation, does not warrant us in denying the plaintiff a judgment here, to which it seems entitled on the facts of this case standing alone, because the plaintiff's position here is not consistent with the position which it took as to one of several asserted grounds for recovery in the other case.

In view of what we have said, it is not necessary to decide whether, as the plaintiff contends, the assessment and collection of the tax were barred by the statute of limitations.

The plaintiff is entitled to recover $4,049.84 with interest as provided by law. It is so ordered.

Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

HARDIE-TYNES MANUFACTURING COMPANY v. THE UNITED STATES

[No. 44385. Decided March 5, 1945]

On the Proofs

Increased labor costs under National Industrial Recovery Act; voluntary increase in wages prior to signing President's Reemployment Agreement and adoption of Code of Fair Competition.—Where, following the enactment of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195) and prior to the promulgation of the President's Reemployment Agreement, which plaintiff signed on December 8, 1933, and prior to the adoption of the Code of Fair competition for plaintiff's industry on October 11, 1933, but after the appeal on July 20, 1933 of the President that employers voluntarily put into effect wage increases in compliance with the National Industrial Recovery Act, plaintiff did put into effect a general increase in the wages of its employes on July 20, 1933; it is *held* that such increase was the result of the enactment of the National Industrial Recovery Act. *National Fireproofing Corporation* v. *United States*, 99 C. Cls. 608, 615, cited.

Same; plaintiff entitled to recover for voluntary increase in wages greater than minimum wages subsequently fixed by Code of Fair Competition.—Where the wages voluntarily fixed by plaintiff on July 20, 1933, were greater than the minimum wages for its industry provided for by the Code of Fair Competition adopted on October 11, 1933; and where it was manifestly impractical for the plaintiff, after the adoption of the Code, to reduce its wages to the minimum wages therein provided; and where this reduction was not made; it is *held* that, with respect to plaintiff's contract of March 6, 1933, with the Navy Department, and with respect to its subcontract of May 25, 1933, with a general contractor with the War Department, plaintiff is entitled to recover the amount of the increase put into effect on July 20, 1933, following the enactment of the Act of June 16, 1933, and the President's appeal to employers of July 20, 1933.

Same; no recovery where proof does not show that wage increases were due to enactment of N. I. R. Act.—Plaintiff is not entitled to recover for wage increases put into effect on March 15, 1934, and April 4, 1934, where it is not shown by the proof that these increases had any relation to the enactment of the National Industrial Recovery Act nor with the adoption of the Code of Fair Competition for its industry on October 11, 1933, nor with the signing of the President's Reemployment Agreement on December 8, 1933.

Same; discretion of Comptroller General under 1934 Act; waiver of time limitation on filing of claim by consideration thereof.—Where it is not shown by the proof that plaintiff filed a claim for its increased labor costs under its subcontract within the time specified by the Act of June 16, 1934; and where plaintiff did not file a formal claim, itemized as required, until May 10, 1935, but subsequently the Comptroller General considered this claim although filed late; it is *held*, following the decision in *The Kawneer Co. et al.* v. *United States*, 100 C. Cls. 523, that the action of the Comptroller General in considering the claim amounted to an extension of time for the filing of the claim under the authority granted the Comptroller General by the 1934 Act.

The Reporter's statement of the case:

Mr. William E. Carey, Jr., for the plaintiff. *Messrs. Rhodes and Rhodes* were on the brief.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is, and was during the times material to this case, a corporation organized and existing under the laws of the State of Alabama, with its principal place of business located at Birmingham, Alabama.

2. On March 6, 1933, plaintiff entered into a contract with defendant acting by the Navy Department (Contract NOs. 30634) for the furnishing of certain air compressors on naval destroyers. Plaintiff began work under this contract prior to July 20, 1933, completed it on January 31, 1935, and was paid the contract price less certain penalties provided by the contract not material to the issues in this case.

3. On May 25, 1933, plaintiff entered into a subcontract with Marietta Manufacturing Company, general contractor, which on June 7, 1933, had entered into a contract with the defendant acting by the War Department (Contract W-1092-eng-3305) for the construction and delivery to the defendant of two channel barges. By the terms of this subcontract plaintiff was required to furnish two main dredging pumps, machined and fitted complete, and two sets of spares, for use in the construction of said channel barges. Plaintiff began work on this subcontract prior to July 20, 1933, com-

pleted it on August 24, 1933, and was paid the contract price by the Marietta Manufacturing Company.

4. In response to the appeal of the President of the United States that employers voluntarily put into effect wage increases in order to comply with the terms of the National Industrial Recovery Act, passed on June 16, 1933, the plaintiff and other employers in plaintiff's line of business put into effect on July 20, 1933, a general increase in wages of their employees. This was prior to the adoption of a code and prior to the time plaintiff signed the President's Reemployment Agreement, but it was done by plaintiff as a result of the enactment of the National Industrial Recovery Act and the President's appeal for voluntary compliance with the spirit thereof. It would not otherwise have been put into effect.

5. On March 15, 1934, and on April 4, 1934, plaintiff gave additional increases in wages to some of its employees, but the evidence does not show that these increases were the result of the enactment of the National Industrial Recovery Act. They came considerably later than the adoption of the Code of Fair Competition for plaintiff's industry on October 11, 1933, and the date plaintiff signed the President's Reemployment Agreement on December 8, 1933.

6. The increases put into effect by plaintiff on July 20, 1933, were in excess of the minima provided by the Code, but after the adoption of the Code it was not practicable to reduce wages to the minima therein provided. The total increase in wages made on July 20, 1933, for direct labor on the compressors, under contract NOs. 30634, from August 10, 1933, to completion of that contract on January 31, 1935, amounted to $2,156.00. The total increase in wages for indirect labor properly allocable to said contract amounted to $1,255.38.

7. The Code of Fair Competition of the Bituminous Coal Industry provided for price fixing by local marketing agencies, and because of the increased prices fixed under that Code, plaintiff had to pay increased prices for coal, of which increase $357.78 was properly allocable to Contract NOs. 30634.

8. The total increase in wages put into effect on July 20, 1933, for direct labor on the subcontract with the Marietta Manufacturing Company from August 10, 1933, to the date

of the completion of that contract on August 24, 1933, amounted to $88.61. The total increase in wages for indirect labor properly allocable to that subcontract was $51.63.

9. Plaintiff filed claim for its increased costs of performance of Contract NOs. 30634 under the provisions of and within the time provided by the act of June 16, 1934 (48 Stat. 974).

10. On August 18, 1933, plaintiff wrote to the Marietta Manufacturing Company about its increased costs under the subcontract due to the National Industrial Recovery Act and asking that company to send to plaintiff any forms that it might have for the purpose of filing claim. On August 21, 1933, the Marietta Manufacturing Company replied that it was doing everything in its power to get an adjustment from the Government and advising plaintiff to keep an accurate record of its increased costs. On September 2, 1933, plaintiff again wrote to the Marietta Manufacturing Company relative to its increased costs which plaintiff then estimated at $735.90 and suggested that the Marietta Manufacturing Company submit plaintiff's claim to the U. S. Engineer Office of the War Department at Memphis, Tennessee. With the approval of the Marietta Manufacturing Company, given by letter dated September 7, 1933, the plaintiff, on September 12, 1933, wrote to the U. S. Engineer Office of the War Department at Memphis about its claim and enclosed a copy of its letter of September 2, 1933, to the Marietta Manufacturing Company. On September 18, 1933, the U. S. Engineer Office of the War Department at Memphis wrote plaintiff as follows:

> Receipt is acknowledged of your letter of Sept. 12, 1933, in which you inclosed a copy of letter addressed to the Marietta Manufacturing Company, in regard to additional costs incurred by you because of the operation of the N. R. A. code in furnishing pumps and radial elbows to the latter to be installed on dredges being constructed for this office.
>
> I regret to advise you that there exists no authority whereby the United States may reimburse a contractor for such increased costs. This matter has been taken up by the Department with higher authority, but we have been informed that no action looking toward a decision will be taken at this time.

11. On May 10, 1935, plaintiff filed in the U. S. Engineer Office of the War Department at Memphis, Tennessee, an itemized claim under the subcontract in the amount of $369.54, and a short time later filed in the same office a corrected or substituted claim in the amount of $224.06 (neither the original nor a copy thereof was filed in evidence), which that office forwarded to the Comptroller General. On August 12, 1935, the Comptroller General wrote to plaintiff as follows:

> Your claim No. 097061 (2) for $224.06, representing increased costs alleged to have been incurred in connection with the construction and delivery at Memphis, Tennessee, of two channel barges on and after August 10, 1933, as a result of compliance with the National Industrial Recovery Act, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.
>
> The records of this office show that under date of June 7, 1933, contract No. W-1092-eng-3305, for the construction and delivery afloat at Memphis, Tennessee, of two channel barges, was entered into with the Marietta Mfg. Company, Pt. Pleasant, W. Va., and that you furnished two 32″ main dredging pumps, machined and fitted complete, with two sets of spares, to the contractor for use in fulfilling its contract.
>
> The act of June 16, 1934, 48 Stat. 974, an act to provide relief to Government contractors whose costs of performance were increased as a result of compliance with the Act approved June 16, 1933, and for other purposes, provides, insofar as is herein material, that in no event shall any allowance exceed the amount by which the cost of performance of such part of the contract as was performed subsequently to August 10, 1933, was directly increased by reason of compliance with a code or codes of fair competition, or with an agreement with the President.
>
> Examination of your claim shows that you signed the President's Reemployment Agreement December 8, 1933, and that you complied with the Pump Manufacturing Industry Code on October 11, 1933, its first effective date, and that you commenced work June 2, 1933, and completed it August 24, 1933, under your contract with the Marietta Mfg. Company.
>
> Since, from the foregoing, it appears that you did not sign the President's Reemployment Agreement or com-

ply with the applicable code until after the work in question was completed, it necessarily follows that whatever increased costs you incurred did not result from compliance with an applicable approved code of fair competition or with an agreement with the President. Your claim must therefore be, and is, disallowed.

I therefore certify that no balance is found due you from the United States.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for increased costs of labor and material required in the performance of a contract with the Navy Department for furnishing certain air compressors, alleged to have been brought about by the passage of the National Industrial Recovery Act, and it also sues for its increased cost of labor in the performance of a subcontract with the Marietta Manufacturing Company, which had a contract with the War Department for the construction and delivery of two channel barges, also alleged to have been the result of the enactment of the National Industrial Recovery Act.

After the passage of the National Industrial Recovery Act on June 16, 1933 (48 Stat. 195), and shortly prior to July 20, 1933, the President of the United States appealed to all employers of labor to voluntarily increase wages in order to comply with the spirit of that Act. This was prior to the promulgation of the President's Reemployment Agreement and prior to the adoption of any Code. In response to this appeal plaintiff and others engaged in the same industry in Birmingham, Alabama, voluntarily put into effect on July 20, 1933, wage increases. The amount of these increases for labor on plaintiff's contract with the Navy Department was $3,411.38, and the amount of the increases on its subcontract with the Marietta Manufacturing Company was $140.24.

There is no doubt that these wage increases were granted by plaintiff and its competitors because of the passage of the National Industrial Recovery Act and the President's appeal for compliance therewith. Under former decisions of this court it must be held, therefore, that these increases

were the result of the enactment of the National Industrial Recovery Act.

The wages fixed by plaintiff and its competitors on July 20, 1933, were greater than the minimum wages provided for by the Code later adopted on October 11, 1933, but it was manifestly impractical for the plaintiff, after the adoption of the Code, to reduce its wages to the minimum therein provided for, and this was not done. Plaintiff is entitled to recover the amount of the increase put into effect on July 20, 1933, in compliance with the President's appeal. *National Fireproofing Corporation* v. *United States*, 99 C. Cls. 608, 615.

Plaintiff is not entitled to recover the increases put into effect on March 15, 1934, and April 4, 1934. So far as the proof shows, these increases had no relation to the enactment of the National Industrial Recovery Act nor with the adoption of the Code on October 11, 1933, nor the signing of the President's Reemployment Agreement on December 8, 1933.

Defendant says the proof does not show that plaintiff filed a claim for its increased costs under its subcontract with the Marietta Manufacturing Company within the time specified by the Act of June 16, 1934 (48 Stat. 974). Prior to the completion of this contract the plaintiff undertook to secure by correspondence with the prime contractor and with the United States Engineer's Office at Memphis,Tennessee, its increased costs, but was advised that there was no authority under which it could be reimbursed. It did not file a formal claim, itemized as required, until May 10, 1935, but subsequently the Comptroller General considered this claim on its merits, although filed late. This, we held in *The Kawneer Co. et al.* v. *United States*, 100 C. Cls. 523, 535, 540, amounted to an extension of time for the filing of the claim under the authority granted the Comptroller General by the Act of June 16, 1934, *supra*. This defense of defendant, therefore, cannot be sustained.

The total increased wages resulting from the enactment of the Act and properly allocable to the two contracts in question was $3,551.62. Defendant admits that plaintiff is entitled to recover the sum of $357.78, the increased price of coal used in the performance of these contracts.

Plaintiff is entitled to recover of the defendant the total sum of $3,909.40. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE STERLING SUPPLY CORPORATION v. THE UNITED STATES

[No. 46024. Decided March 5, 1945]

On the Proofs

Government contract; plaintiff entitled to recover balance due under the contract.—Where plaintiff shipped the material called for under its contract with the Government and rendered its invoices to the proper Navy Department Bureau, which were approved by that bureau without dispute, after an allowance for breakage; it is *held* that, on the evidence adduced, the plaintiff is entitled to recover the balance due, after allowing for all just credits and offsets.

The Reporter's statement of the case:

Mr. Richard S. Doyle for the plaintiff. *Messrs. Blair & Körner* and *Mr. Stanley Worth* were on the brief.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation, organized April 3, 1925, under the laws of the State of Pennsylvania, with its principal office and place of business at 1 Porter Street, Philadelphia, Pennsylvania. Its principal business is the manufacture and sale of chemical and laundry supplies.

2. By contract dated March 1, 1943, designated as NXs S–24360, between plaintiff and the defendant, the parties contracted for the sale by plaintiff to the defendant of aqua ammonia, Class B, for the sum of $19,107.12. The contract provided for delivery of approximate quantities of the aqua ammonia to various Naval Supply Officers, at specified unit

prices, under designated lot numbers and item numbers, including, *inter alia*, the following:

Lot 785, Item 1b, about 660 lbs., at 19¢ (1-lb. bottles)
Lot 785, Item 2b, about 48 lbs., at 14¢ (4-lb. bottles)

to be shipped to the Supply Officer, Navy Yard, Puget Sound (Bremerton), Washington, also

Lot 784. Item 1c, about 80,000 lbs. at 14½¢ (1-lb. bottles)

to be shipped to the Supply Officer in Command, Naval Supply Depot, Mechanicsburg, Pennsylvania.

3. Plaintiff shipped the material called for under the contract and rendered its invoices to the disbursing division, Bureau of Supplies and Accounts, Navy Department. Included in the invoices so rendered were the following:

(a) Invoice No. 51651, dated May 24, 1943 (Order No. 55339), covering shipment on that date to the Supply Officer, Navy Yard, Puget Sound. (Bremerton), Washington, as follows:

Lot 785, Item 1b, 672 lbs. (1-lb bottles), at .19	$127.68
Lot 785, Item 2b, 48 lbs. (4-lb bottles), at .14	6.72
Total	134.40

(b) Invoice No. 51669, dated May 29, 1943 (Order No. 55333), covering shipment on that date to the Supply Officer, Naval Supply Depot, Mechanicsburg, Pa., as follows:

Lot 784, Item 1c, 69600 lbs. (1-lb. bottles), at .145, $10,092.00.

4. An adjustment on plaintiff's Invoice No. 51669 was made in the sum of $52.20, to allow for breakage in transit, thereby reducing the amount thereof from $10,092.00 to $10,039.80. There has never been any dispute between plaintiff and the defendant as to deliveries under Contract No. NXs S-24360. The Bureau of Supplies and Accounts issued its voucher No. 105645 approving for payment in the aggregate sum of $10,174.20, plaintiff's Invoices Nos. 51651 and 51669 ($134.40 plus $10,039.80).

5. Voucher No. 105645 was forwarded to the General Accounting Office for direct settlement, as the result of which the plaintiff received payment in the sum of $275.34 and has not received payment of the balance of $9,898.86.

6. There is now due and owing to plaintiff, under Contract No. NXs S–24360, the said balance of $9,898.86, after allowing for all just credits and offsets.

The court decided that the plaintiff was entitled to recover.

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover $9,898.86.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of nine thousand eight hundred ninety-eight dollars and eighty-six cents ($9,898.86).

Opinion per Curiam:

The foregoing findings of fact show that the Government received goods from the plaintiff under a contract which fixed the price of the goods at $10,174.20 but has paid the plaintiff only $275.34. The plaintiff is therefore entitled to recover the balance of $9,989.86.

It is so ordered.

HOWARD E. BOTTOMLEY v. THE UNITED STATES

[No. 45645. Decided March 5, 1945]

On the Proofs

Pay and allowances; Army officer with dependent mother.—Following the decisions in *Mumma* v. *United States*, 99 C. Cls. 261, and *Herrick* v. *United States*, 100 C. Cls. 308, it is *held*, upon the undisputed facts, that plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell* and *Ansell* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Howard E. Bottomley, was federally recognized as a 2nd Lieutenant, Field Artillery, Rhode Island

National Guard, May 20, 1936; appointed 2nd Lieutenant, Field Artillery, National Guard of the United States, July 2, 1936; temporarily promoted to 1st Lieutenant, Field Artillery, Army of the United States, July 1, 1941, and was promoted to the rank of Captain, August 5, 1942. He entered on active duty February 24, 1941, pursuant to the order of the President, dated January 14, 1941.

2. Plaintiff claims the statutory rental and subsistence allowances of an officer of his rank with a dependent mother for the period from March 13, 1941, to November 30, 1942, inclusive. He received dependency allowances on account of a dependent mother from December 1, 1942, to May 9, 1943, on which later date he married.

3. Plaintiff's mother, Grace M. Bottomley, is a widow, plaintiff's father, Arthur M. Bottomley, having died October 18, 1918, after which she did not remarry. The only property left by him at the time of his death were dividends of his insurance amounting to $78. Plaintiff's mother owned no property, was not gainfully employed, and had no income other than that contributed to her by the plaintiff.

4. Since the commencement of this suit and for many years prior thereto, plaintiff's mother lived in an apartment in Providence, Rhode Island. No one lived with her during the period of the claim. Her household and living expenses averaged about $65 a month. Plaintiff's mother has two children besides the plaintiff, a son, married, with one child, and a daughter, who is a widow with one child. Neither the son nor the daughter contributed anything to the support of their mother for the reason that they were not financially able.

5. Plaintiff contributed not less than $60 a month regularly to the support of his mother. In addition, he gave her money in smaller amounts at irregular intervals.

6. From March 13, 1941, to sometime in 1942, plaintiff was on active duty at Camp Blanding, Florida; from there he moved to Camp Shelby, Mississippi, and thence to Camp Howze on June 1, 1942, where he remained during the period of the claim. While at Camp Blanding and Camp Shelby he occupied a pyramidal tent, and while at Camp Howze he

lived in the barracks. Such quarters consisted of one room, assigned to him and another officer.

7. The quarters assigned to and occupied by plaintiff were not adequate for an officer of his rank with a dependent nor were any quarters available for the occupancy of himself and his mother. At no time during the period of the claim from March 13, 1941, to November 30, 1942, was he paid rental allowance as an officer without a dependent or rental and subsistence allowances on account of a dependent. He filed a claim with the General Accounting Office for such allowances, but his claim was denied. Plaintiff's mother did not at any time occupy Government quarters.

8. Plaintiff's mother was in fact dependent upon him for her chief support during the period here involved.

9. In accordance with a computation by the General Accounting Office, the amount of rental and subsistence allowances for an officer of plaintiff's rank and length of service with a dependent for the period from March 13, 1941, to November 30, 1942, is $1,641.10.

The court decided that the plaintiff was entitled to recover.

Opinion per Curiam:

The facts in this case are not in dispute and show conclusively that plaintiff's mother was dependent upon him for her chief support for the period from March 13, 1941, to November 30, 1942. Plaintiff is entitled to recover $1,641.10. It is so ordered. See *Mumma* v. *United States*, 99 C. Cls. 261; *Herrick* v. *United States*, 100 C. Cls. 308.

RICHARD EVELYN BYRD v. THE UNITED STATES

[No. 45887. Decided March 5, 1945]

On the Proofs

Pay and Allowances; appointment as rear admiral on retired list under special act does not carry with it right to "allowances" of rear admiral on active list.—Where the special Act of Congress, approved December 21, 1929 (46 Stat. 1633), provided that the President was authorized to advance the plaintiff, then a commander on the retired list of the Navy, "to the grade of

rear admiral on the retired list of the Navy, with rank, pay, and allowances effective from the date of the approval of this Act"; and where plaintiff was duly appointed a rear admiral pursuant to the authority granted by the special act; it is *held* that plaintiff, while in an inactive status on the retired list was not entitled to the allowances of a rear admiral on active duty.

Same; intention of Congress in use of word "allowances" in certain special acts; legislative history of Act of February 6, 1942.—The Act of February 6, 1942 (56 Stat. 48), was passed to correct the use of certain rather loose language in the special acts under consideration in the cases of *Sweeney* v. *United States*, 82 C. Cls. 640; *Ralston* v. *United States*, 91 C. Cls. 91; *Long* v. *United States*, 93 C. Cls. 544, and other cases in which it was provided that the respective plaintiffs in those cases should be appointed to certain grades on the retired lists, with the pay and "allowances" of those grades.

Same; plaintiff retired as rear admiral under special act entitled only to pay and allowances received by officers of equal rank retired under general law.—Following the declaration of policy set forth by Congress in the Act of February 6, 1942, it is *held* that when Congress passed the Act of December 21, 1929, authorizing the President to advance plaintiff to the grade of rear admiral on the retired list of the Navy "with rank, pay, and allowances effective from the date of approval of this Act," it was the intention of Congress that plaintiff should receive only that pay and those allowances, if any, to which a rear admiral who had been retired under general law was entitled, and plaintiff is not entitled to recover for rental or subsistence allowances while in inactive status on the retired list.

Same; Acts of March 3, 1899; May 13, 1909, and August 29, 1916, applicable only to officers on active list.—The provisions of the Acts of March 3, 1899 (30 Stat. 1004); May 13, 1908 (35 Stat. 127) and August 29, 1916 (36 Stat. 556), relating to the advancement of admirals of the lower half to the upper half in accordance with length of service, with increases in pay, apply only to officers on the active list of the Navy, and not to officers on the retired list.

Same; retired officer recalled to active duty is still on retired list and prohibited from receiving higher pay than when retired.—When a retired Navy officer is recalled to active duty he is still on the retired list, and under the provisions of the Act of August 5, 1882 (22 Stat. 284), he is prohibited from receiving more pay than that to which he was entitled when retired. *Fulmer* v. *United States*, 32 C. Cls. 112, 119; 18 Op. A. G. 96.

Same; Act of July 24, 1941, not applicable to plaintiff who was recalled to active duty in the grade in which he was retired.—

The Act of July 24, 1941 (55 Stat. 603), providing that officers on the retired list may, while on active duty, be temporarily appointed to higher ranks or grades on the retired list and in such case "shall, while on active duty, be entitled to the same pay and allowances as officers of like grade or rank with equivalent service on the active list" has no application to plaintiff who was not given any temporary appointment to higher grade but was merely recalled to active duty in the grade in which he was retired.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. C. R. Apple, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon the evidence and the agreed statement of facts entered into between the parties:

1. Plaintiff was appointed a midshipman to the United States Naval Academy on May 28, 1908, and upon graduation was commissioned an ensign in the United States Navy on June 8, 1912. Plaintiff served on active duty as a commissioned officer from said date until March 15, 1916, when he was released from active duty and placed on the retired list for physical disability. Since March 15, 1916, plaintiff has been, and is now, an officer of the United States Navy on the retired list. About June 9, 1916, plaintiff again reported for active duty with the Navy and served on active duty until on or about October 1, 1931, when he was again released from active duty. He was recalled to active duty on October 4, 1939.

2. On December 21, 1929, the following Act of Congress was approved (46 Stat. 1633):

> That the President of the United States be, and he is hereby, authorized to advance Commander Richard E. Byrd, United States Navy, retired, to the grade of rear admiral on the retired list of the Navy, with rank, pay, and allowances effective from the date of approval of this Act, in recognition of his extensive scientific investigations and extraordinary aerial explorations of the Antarctic Continent, and of the first mapping of the South Pole and Polar Plateau by air

3. The President appointed plaintiff a rear admiral on the retired list of the United States Navy effective from December 21, 1929.

4. During the period from June 15, 1937, to October 3, 1939, both dates inclusive, plaintiff received three-fourths of the active-duty pay of a rear admiral, lower half, being pay at the rate of $4,500 per year, but during said period plaintiff received no rental nor subsistence allowances. Plaintiff claims rental and subsistence allowances for an officer of his rank with dependents for said period.

5. Plaintiff has been continuously on active duty since October 4, 1939. During the period from October 4, 1939 to February 23, 1940, both dates inclusive, plaintiff received the active-duty pay and allowances of a lieutenant commander with over 15 years of service, and during the period from February 24, 1940 to October 7, 1940, both dates inclusive, plaintiff received the active-duty pay and allowances of a lieutenant commander with over eighteen years of service. During the period from October 8, 1940 to December 30, 1943, plaintiff received the active-duty pay and allowances of a rear admiral of the lower half of the Navy.

6. Plaintiff has been a retired officer with dependents since June 15, 1937.

7. Since December 21, 1929, plaintiff has been listed and carried on the official records of the United States Navy as a retired rear admiral of the lower half.

8. On March 2, 1933, Alfred Wilkinson Johnson, then on the active list of officers of the United States Navy, was commissioned a rear admiral to rank from February 1, 1933. On June 3, 1937, said officer entered the upper half of the list of rear admirals.

9. On September 3, 1940, Aubrey Wray Fitch, then on the active list of officers of the United States Navy, was commissioned a rear admiral to rank from July 1, 1940. On May 30, 1942, said officer entered the upper half of the list of rear admirals.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

In his first cause of action plaintiff sues to recover the allowances to which he claims he is entitled under a special Act of Congress, approved December 21, 1929 (46 Stat. 1633), for the period June 15, 1937, to October 3, 1939. This Act reads as follows:

> * * * That the President of the United States be, and he is hereby, authorized to advance Commander Richard E. Byrd, United States Navy, retired, to the grade of rear admiral on the retired list of the Navy, with rank, pay, and allowances effective from the date of approval of this Act, in recognition of his extensive scientific investigations and extraordinary aerial explorations of the Antarctic Continent, and of the first mapping of the South Pole and Polar Plateau by air.

He was duly appointed a rear admiral pursuant to the authority granted by this Act.

From June 15, 1937, to October 3, 1939, both dates inclusive, plaintiff was in an inactive status. On October 4, 1939, he was recalled to active duty. The question is whether or not his appointment "to the grade of rear admiral on the retired list of the Navy, with rank, pay, and allowances effective from the date of the approval of this Act," entitles him while in an inactive status on the retired list to the allowances of a rear admiral on active duty.

In *Sweeney* v. *United States*, 82 C. Cls. 640, 642, the court had under consideration a statute authorizing the President "to advance Chief Boatswain, Edward Sweeney, United States Navy, retired, to the rank of lieutenant (junior grade) on the retired list of the Navy, with the retired pay and allowances of that rank." The court held that the plaintiff was entitled to the allowances of a lieutenant (junior grade) on active duty.

In the case of *Ralston* v. *United States*, 91 C. Cls. 91, 94, the court had before it an Act authorizing the President to appoint Ralston "a lieutenant commander in the United States Navy and place him upon the retired list of the Navy with the retired pay and allowance of that grade." The court held plaintiff was entitled to the allowances of a lieutenant commander on active service.

In *Long* v. *United States*, 93 C. Cls. 544, 546, the Act under construction read, "That the President is authorized to place Lieutenant (Junior Grade) Christopher S. Long, Chaplain Corps, United States Navy, upon the retired list of the Navy with the retired pay and allowances of that rank * * *." Plaintiff said the case was controlled by the *Sweeney* and *Ralston* decisions, but the defendant vigorously urged that these cases had been wrongly decided. However, a majority of the court, following these cases, held that Long was entitled to the allowances of a lieutenant (junior grade) on active duty. Judges Madden and Littleton dissented.

On the same day that the *Long* case was decided, the court decided the case of *Blair* v. *United States*, 93 C. Cls. 555, 557, construing an Act which authorized the President to appoint Blair a second lieutenant in the United States Marine Corps, "and to retire him and place him upon the retired list of the Marine Corps with the retired pay and emoluments of that grade." This Act used the word "emoluments" instead of the word "allowances," which was used in the *Long*, *Sweeney* and *Ralston* cases. The court held that plaintiff was not entitled to rental and subsistence allowances.

After the decisions in the *Long* and *Blair* cases, the court decided the cases of *Robertson* v. *United States*, 94 C. Cls. 61, 63; *Willey* v. *United States*, 94 C. Cls. 588, 589; and *Horton* v. *United States*, 94 C. Cls. 591, 594.

In the *Robertson* case the court had under construction an Act authorizing the President to appoint him "a lieutenant commander on the retired list of the Navy with pay and allowances of the fourth pay period." The court held that he was not entitled to the allowances of a lieutenant commander on active duty.

The act under construction in the *Willey* case authorized the Secretary of the Navy "to grant said officer the retired pay and allowances of his rank and length of service in accordance herewith." The court held that he was not entitled to the allowances of an officer of his rank on active duty.

In the *Horton* case the President was authorized to appoint him a commander in the United States Naval Reserve force

"and to place him upon the retired list of the Navy with the retired pay and emoluments of that grade." It was held that he was not entitled to subsistence and rental allowances.

In the *Blair*, *Robertson*, *Willey* and *Horton* cases the majority saw some difference in the language used in the Acts there under construction and that used in the *Long* case. It must be confessed that the difference was slight, but in the case at bar there is no material difference. However, we are of opinion the decision in the *Long* case should not now be followed in view of the Act of February 6, 1942 (c. 37, 56 Stat. 48). This Act reads as follows:

> That hereafter money allowances for subsistence and rental shall not accrue to any officer of the Navy or Marine Corps on the retired list for any period during which any such officer is not employed on active duty.
>
> SEC. 2. All laws and parts of law, insofar as they are in conflict with the provisions of this Act, are hereby repealed.

The Committee on Naval Affairs of the House of Representatives reporting this bill, said:

> Officers of the Navy and Marine Corps who are retired under the general law are not entitled to rental and subsistence allowances on the retired list except when ordered to active duty. There are, however, six officers retired under special acts who are entitled to these allowances, under ruling of the Court of Claims, because the special acts contain the words "pay and allowances" or "pay and emoluments." The result is a discrimination in favor of a few officers on the retired list and against the remaining retired officers (Report #1581, H. R. 77th Cong. 2d sess.).

This Act of February 6, 1942, is not retroactive, but we think that it must be taken into consideration in determining what Congress intended in the passage of the special Acts in the above-mentioned cases. *Norfolk Southern Railroad Company* v. *United States*, 96 C. Cls. 357, 371, and cases there cited.

The passage of this Act of February 6, 1942, seems to us to indicate that Congress intended to correct the use of rather loose language in the special acts under consideration in the *Sweeney*, *Ralston*, *Long*, and other cases. In those

Acts Congress provided for appointment of certain officers to certain grades on the retired list, with the pay and *allowances* of those grades. Although officers retired under general law were not entitled to rental and subsistence allowances, the court concluded that Congress must have intended that these particular officers should receive the allowances, otherwise this word would not have been used. It was so held although it was recognized that this would result in preferred treatment for them.

When this was called to Congress' attention, it passed the Act of February 6, 1942, correcting this situation and placing such officers in the same status as officers retired under general law. The decisions in the *Sweeney*, *Ralston* and *Long* cases were decisions giving effect to what the court understood was the intention of Congress in those Acts; but it appears from the passage of this Act of February 6, 1942, that this was not Congress' intention, but that it rather intended that these officers should have only those allowances, if any, to which officers were entitled who had been retired under general law.

We must conclude, therefore, that when Congress passed the Act of December 21, 1929, *supra*, authorizing the President to advance Commander Richard E. Byrd to the grade of rear admiral on the retired list of the Navy "with rank, pay, and allowances effective from the date of approval of this Act," it must have intended to give him only that pay and those allowances, if any, to which a rear admiral who had been retired under general law was entitled.

Indeed, as the defendant says in its excellent brief in this case, we must go to the general law to ascertain to what pay and allowances Commander Byrd is entitled, because the special Act itself does not set them out. Looking to the general law, we find that as a rear admiral on the retired list he is entitled to certain pay, but that he is not entitled to any rental or subsistence allowances.

We hold, accordingly, that the plaintiff is not entitled to recover on his first cause of action.

SECOND CAUSE OF ACTION

In his second cause of action plaintiff claims the difference in pay to which a rear admiral of the upper half is entitled

and that to which a rear admiral of the lower half is entitled for the period from October 8, 1940, to date, or from May 30, 1942, to date. He has been paid the pay of a rear admiral of the lower half.

Plaintiff was recalled from retirement and placed on active duty on October 4, 1939. He has been on active duty ever since. He claims the right to count the time he has served on active duty in determining the pay to which he is entitled, or, in the alternative, to claim the entire time since he was first commissioned a rear admiral. We are of opinion that he is not entitled to the pay of a rear admiral of the upper half for any length of time.

Prior to the Act of March 3, 1899 (c. 413, 30 Stat. 1004), there was only one grade of rear admirals. The next lower grade was that of commodore, who ranked with a brigadier general of the Army. Section 7 of the Act of March 3, 1899, *supra*, abolished the grade of commodore in the Navy, and provided "that the active list of the line of the Navy * * * shall be composed of eighteen rear admirals * * * *Provided*, That each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier general in the Army. * * *" This was the pay and allowance to which a commodore was formerly entitled. It is the pay which plaintiff has received.

The Act of May 13, 1908 (35 Stat. 127), provided in part:

> Hereafter all commissioned officers of the *active* list of the Navy shall receive the same pay and allowances according to rank and length of service, and the annual pay of each grade shall be as follows: * * * rear admiral, first nine, eight thousand dollars; rear admiral second nine, or commodore, six thousand dollars; * * * [Italics ours.]

The Act of August 29, 1916 (39 Stat. 556, 577–578), provided in part:

> Hereafter pay and allowances of officers in the upper half of the grade or rank of rear admiral, * * * shall be that now allowed by law for the first nine rear admirals, and the pay and allowances of officers in the lower half of the grade or rank of rear admiral * * *

shall be that now allowed by law for the second nine rear admirals: * * *.

Under this latter Act a rear admiral received the pay of the upper half as soon as his length of service exceeded that of one-half of the rear admirals on the active list.

Plaintiff claims that as soon as his length of active service exceeded that of one-half of the rear admirals on active service, including those recalled to active service from the retired list, he became entitled *eo instante* to the pay of the upper half. The answer to this is that the above-quoted provisions of the Acts of March 3, 1899, May 13, 1908, and August 29, 1916, apply only to officers on the active list and have no application to officers on the retired list. As noted above, section 7 of the Act of March 3, 1899, *supra*, referred only to the "active" list of the line of the Navy, and the Act of May 13, 1908, and that of August 29, 1916, although that does not appear from the above-quoted provision, also refer only to officers on the active list.

There are two separate lists in the Navy, the active list and the retired list. The Act of December 21, 1929 (46 Stat. 1633), authorized the President to appoint plaintiff a rear admiral on the retired list, not on the active list. He was so appointed. Officers on this list are by section 1459 of the Revised Statutes "withdrawn from command and from the line of promotion on the active list" (34 U. S. C. 401).

The Act of August 5, 1882 (c. 391, 22 Stat. 284), appropriated sums for the naval service, so much for the pay of the Navy for the active list, and so much "for pay of the retired list," and expressly provided that "hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and pay of officers on the retired list shall be the same that they were when such officers shall be retired." Although a retired officer is recalled to active duty, he is still on the retired list and, therefore, by the above provision is prohibited from receiving more pay than that to which he was entitled when retired. *Fulmer* v. *United States*, 32 C. Cls. 112, 119; 18 Op. A. G. 96.

Plaintiff says that section 1459 of the Revised Statutes and the Act of August 5, 1882, supra, have no application to him

because of the provisions of the Act of July 24, 1941 (55 Stat. 603), section 4 (a) of which reads as follows:

> Commissioned or warrant officers on the retired list of the Navy or Marine Corps may, while on active duty, be temporarily appointed to higher ranks or grades on the retired list. Any officer so appointed shall, while on active duty, be entitled to the same pay and allowances as officers of like grade or rank with equivalent service on the active list.

This Act, however, has no application to plaintiff because he has not been given any temporary appointment to a higher grade. He was merely recalled to active duty in the grade in which he was retired. There can be no doubt of the President's authority to appoint him to a higher grade while on active duty, subject to confirmation by the Senate, but this has not been done.

We are of opinion that plaintiff is not entitled to recover on this second cause of action. His petition, therefore, will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NATIONAL WOODEN BOX ASSOCIATION v. THE UNITED STATES

[No. 45929. Decided March 5, 1945]

On the Proofs

Social Security Tax; an officer of a corporation receiving no compensation is not an employee.—An officer of a corporation who receives for his services no compensation in cash or its equivalent is not an "employee" within the meaning of the Social Security Act (49 Stat. 620; U. S. Code, Title 26, Sections 1600–1611).

Same; only paid employees included under Social Security tax.—The Social Security tax is levied on the employer for the exercise of the privilege of having 8 or more individuals in his employ; and the tax is measured by the wages paid, and

hence the presumption is that Congress, in levying the tax on an employer having 8 or more employees, had in mind only paid employees.

Same; inclusion of officers of corporation among employers applies only to officers receiving compensation.—In providing in Section 1101 of the Social Security Act for the purpose of the unemployment tax, that an officer of a corporation should be considered an employee, Congress did not intend to include an officer who received no compensation, who did not increase the corporation's tax burden and who derived no benefits from the tax. *Deecy Products Co.* v. *Welch*, 124 Fed. (2d) 592; *Independent Petroleum Corp.* v. *Fly*, 141 Fed. (2d) 189; *Magruder* v. *Yellow Cab Co. of D. C.*, 141 Fed. (2d) 324.

Same; corporation having less than 8 employees, exclusive of unpaid officers, not liable for tax.—Where plaintiff, a nonprofit unincorporated association, had less than 8 employees, exclusive of the officers who received no compensation; it is *held* that for the years 1936, 1937 and 1938, plaintiff was not liable for the taxes levied under the Social Security Act nor for the year 1939 for the taxes levied under the Unemployment Tax Act, and is entitled to recover.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. J. A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff, hereinafter sometimes referred to as the "Association," is a nonprofit unincorporated trade association of manufacturers of wooden boxes, maintaining its office and place of business in the City of Washington, District of Columbia. A true copy of its constitution is attached to stipulations herein and made a part hereof by this reference.

2. At the request of the collector of internal revenue at Baltimore, Maryland, for the district comprising the State of Maryland and the District of Columbia, plaintiff executed and filed on December 14, 1942, for the calendar years 1936, 1937, and 1938, separate returns of excise tax on employers under Title IX of the Social Security Act, and at the same time filed a similar return for the calendar year 1939 under the provisions of the Federal Unemployment Tax Act, now

appearing as Chapter 9, Subchapter C, of the Internal Revenue Code.

3. The Commissioner of Internal Revenue thereafter timely assessed tax, penalty, and interest upon plaintiff's returns in the aggregate sum of $1,081.93, itemized as follows:

Year	Tax	Penalty	Interest
1936	$70.48	$17.62	$24.33
1937	229.60	57.40	68.29
1938	223.40	55.85	52.54
1939	198.16	49.54	34.72

After due notice and demand, and on May 26, 1943, under protest, plaintiff paid to the collector of internal revenue at Baltimore, Maryland, the aggregate sum of $1,081.93.

Thereafter the Commissioner of Internal Revenue determined and allowed as an overassessment and an overpayment for the calendar year 1936 the sum of 48¢ as tax and 12¢ as penalty, a total of 60¢, which was repaid to the plaintiff.

4. On June 4, 1943, plaintiff filed separate formal claims for refund, executed and signed by C. D. Hudson, secretary and manager, for the sums paid as aforesaid for the calendar years 1936, 1937, 1938, and 1939. These claims each set forth as grounds that plaintiff was not an employer within the purview and meaning of the applicable statute, and was not subject to the tax thereby imposed. After consideration of those claims for refund, the Commissioner of Internal Revenue, by registered letter dated July 12, 1943, advised plaintiff as follows:

> Information furnished by your representative, Mr. L. L. Hamby, Washington, D. C., disclosed that your Association had more than eight employees during the years 1936 through 1939, if your president, three vice presidents, and treasurer, were included as employees, but that it was your contention that such officers were not employees since they received no remuneration from the Association and performed no services which were subject to the control of anyone.
>
> On April 16, 1943, Mr. Hamby was advised that this office had considered the facts and arguments presented and had concluded that the president, three vice presidents, and treasurer were your employees within the meaning of Title IX of the Social Security Act and the

Federal Unemployment Tax Act. Consequently, they must be included in determining the number of your employees for the years 1936 through 1939. Since information in the files discloses that you had eight or more employees on twenty days during each of the years under consideration, each such day being in a different calendar week, you were an employer subject to the above-mentioned tax, and your claims are disallowed.

This notice of disallowance is sent by registered mail in accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code.

5. Not counting as employees its president, three vice presidents and its treasurer, plaintiff had the following number of employees, including its secretary-manager, Mr. Hudson, within the meaning of the applicable revenue acts: Four employees during the year 1936, seven employees during the year 1937, and six employees during each of the years 1938 and 1939.

6. During the years to which this suit relates the duties of the Association's president were presiding over the annual meetings and writing occasional letters. For this he received no remuneration and was entitled to none.

The three vice presidents performed no duties, received no remuneration, and were entitled to none. Their official position was essentially an honorary one.

The treasurer of the Association countersigned checks upon the Association's bank of deposit. Under an arrangement with the bank such checks were to be valid only when countersigned either by the treasurer or by a previously designated member of the Association's Board of Governors. The staff of employees at the Association's office and place of business performed the actual work normally done by a treasurer, except for the countersigning of checks. The treasurer received no remuneration from the Association and was entitled to none.

During the years involved herein the Association provided the president, vice presidents, and treasurer with no office, no clerical assistants, no tools with which to perform any duties. These officers were members of the Board of Governors. They did not hire the employees, fix their wages,

or discharge them. These duties were performed by the secretary-manager.

The policies of the Association were not determined by the president, the vice presidents, or the treasurer, but by the Board of Governors.

The business of the Association was actually conducted by the secretary-manager.

In some instances, where the president made a trip to preside over a meeting, exclusively for that purpose, he was reimbursed his actual traveling expenses by the Association, and no more.

7. During the years here in question the president, vice presidents, and treasurer of the Association were not employees thereof.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover $1,081.93, taxes and penalties and interest assessed for the years 1936, 1937, and 1938 under Title IX of the Social Security Act (c. 531, 49 Stat. 620, 639–645), and for the year 1939 under the Federal Unemployment Tax Act (Chapter 9, Subchapter C, Internal Revenue Code, 53 Stat. Part I, 174, 183; Title 26, U. S. C. 1940 ed., pp. 2211–2219). [Sections 1600–1611.]

The applicable provisions of the two Acts are the same. Section 901 of the Social Security Act reads as follows:

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

IMPOSITION OF TAX

> Section 901.—On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *.

Section 902 provides for a credit against the tax for the contributions made by the taxpayer to a State unemployment fund in an amount not to exceed 90% of the tax.

Section 907 reads in part:

> Sec. 907. When used in this title—
>
> (a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.
>
> (b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.
>
> (c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except— * * *.

Section 1101 (a) of Title XI, which contains general provisions applicable to all titles of the Act, reads in part:

> Section 1101. (a) When used in this Act—
>
> * * * * *
>
> (6) The term "employee" includes an officer of a corporation.

Plaintiff is a nonprofit unincorporated association of wooden box manufacturers. For all of the years in question it had less than eight employees, exclusive of the president, three vice presidents, and the treasurer. The business of the association was run by the secretary-manager, who received a salary for his services. Including the secretary-manager, the association had four employees in 1936, seven in 1937, and six in 1938 and 1939.

The duties of the president, the three vice presidents and the treasurer were nominal. They served without pay. The president's duties consisted of presiding over the annual meetings and writing occasional letters. The Association provided him with no office, supplies or equipment, nor clerical or other assistants. He did not hire the employees, fix their wages, nor have the right to discharge them. Such duties were performed by the secretary-manager, who was employed by the Board of Governors, and worked under their supervision. The vice presidents performed no duties. The treasurer had no office, supplies, nor assistants. His sole duty was to countersign checks.

Under these facts we are of opinion plaintiff is not liable for the tax.

The tax is levied on the employer for the exercise of the so-called privilege of having eight or more individuals in his employ. It reads, "every employer * * * shall pay * * * an excise tax, with respect to having [8 or more] individuals in his employ * * *." It is measured by "the total wages * * * payable by him * * * with respect to employment." The tax, then, is levied on the privilege of having eight or more individuals in one's employ measured by the wages paid for such employment. Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

It would seem, therefore, that Congress used the word "employ" in its usual sense of "to hire," and that the tax was levied only on those who hired eight or more persons. Since the tax was to be measured by the wages paid for the employment, the presumption is that Congress, in levying the tax on one having eight or more employees, had in mind only paid employees. An officer who received no compensation did not increase the tax burden on a corporation subject to the tax, for the tax was measured by the total wages paid. Since in measuring the tax such a person did not count, it would seem inconsistent to count him in order to bring the corporation within the class subjected to the tax. For both purposes it would seem Congress had in mind only persons who were paid compensation.

This is the usual sense in which the word "employee" is used. Webster defines an employee as "one who works for wages or salary in the service of an employer." It is generally so defined. In fact, there can be no enforceable contract of employment without an agreement to pay compensation in some form; otherwise, there would be no consideration for the contract.

The Act uses the word "wages" instead of compensation. It defines this word to mean "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." Unless these officers received some sort of remuneration having a cash value, they were not

employees as that word was evidently used in the Act. It is agreed that they received no compensation having a cash value.

Defendant insists, however, that Congress, in section 1101 (a) *supra*, has enacted that the word "employee" includes "an officer of a corporation," and, therefore, that the officers of this association must be included. We do not think this follows. The word "employee" ordinarily denotes a subordinate person; it is frequently construed to exclude the officers of a corporation. The purpose of this section was intended to prevent this construction. *Deecy Products Co.* v. *Welch*, 124 F. (2d) 592. We do not think it was intended to include an officer who received no compensation for his services.

The Circuit Court of Appeals for the 10th Circuit in *Nicholas* v. *Richlow Mfg. Co.*, 126 F. (2d) 16, took the contrary view, but we do not think Congress intended by this general provision to include within the employees of a corporation, for the purpose of the unemployment tax, an officer who received no compensation, who did not increase the corporation's tax burden and who derived no benefits from the Act. Only those employees were to be counted who drew compensation and for whose benefit the Act was enacted.

This is in accord with the decisions of the 1st, 4th, and 5th Circuit Courts of Appeal in *Deecy Products Co.* v. *Welch*, *supra; Independent Petroleum Corp.* v. *Fly*, 141 F. (2d) 189; *Magruder* v. *Yellow Cab Co. of D. C.*, 141 F. (2d) 324.

Plaintiff is entitled to recover the amount of $1,081.93, less 60 cents which has been refunded, plus interest as allowed by law. Judgment for this amount is rendered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

UNITED FRUIT COMPANY v. THE UNITED STATES

[No. 44232. Decided March 5, 1945. Defendant's motion for new trial overruled June 4, 1945]

On the Proofs

Foreign mails, liability for carrying in absence of contract and of agreement for payment by third party.—Where the plaintiff, operating a line of ships, registered under the laws of the Republic of Panama, between United States ports and Central American ports, accepted from the United States and transported to Central American ports foreign mails delivered to it in accordance with regulations promulgated by the Postmaster General, without any express contract but in accordance with the provisions of Section 4016 of the Revised Statutes, as amended, and of the Act of February 6, 1929; it is *held* that, since there is no showing that the plaintiff had agreed to look to someone else for its compensation, the primary liability to pay for these services is on the defendant and plaintiff is entitled to recover.

Same; absence of definite agreement by third party to pay for services.—Where the agreement of a third party to pay the debt of another is uncertain, no agreement can be implied on the part of the creditor to look alone to the third party for compensation and to absolve from liability the person for whom the service was rendered.

Same; agreement of defendant to pay for services demanded by it to be implied in absence of disavowal to do so.—Where the defendant did not disavow liability for the charges for carrying foreign mails, the plaintiff had the right to assume that the party who demanded the service intended to pay for it, if the third party did not, and it must be implied that the defendant so intended. *Standard Fruit and Steamship Company* v. *The United States*, *post*, p. 659, distinguished.

The Reporter's statement of the case:

Mr. William I. Denning for the plaintiff. *Messrs. John W. Cross* and *Richard A. Fitzgerald* were on the brief.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Sidney J. Kaplan* and *Thomas F. McGovern* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff, United Fruit Company, is a corporation organized and existing under the laws of the State of New Jersey. It owns all the stock of the Balboa Shipping Company, a corporation chartered under the laws of the Republic of Panama. The latter company during the time in question had nine steamships registered under the flag of the Republic of Panama. Plaintiff operated these ships under a bare boat charter from ports in the United States to ports in Cuba, Jamaica, Colombia, Panama Canal Zone, Costa Rica, Honduras, Guatemala, and British Honduras.

2. During the period November 5, 1932, to August 29, 1938, the postmasters at New York, New Orleans, Mobile, and Galveston tendered mails to plaintiff for transportation on said vessels to ports in Cuba, Jamaica, Colombia, Panama Canal Zone, Costa Rica, Honduras, British Honduras, and Guatemala. The mails transported were classed by the Post Office Department as letter mails, prints, registered or "red label" mails, and parcel post. Some of the mails of these classifications were of United States origin and other mails of these classifications were foreign transit mails, i. e., foreign closed mails moving through domestic ports in the United States to foreign ports at which plaintiff's steamers were expected to call.

3. On or about the first of each month plaintiff received from the postmaster at New York a blank form to be filled out and returned by the 5th of the month, showing dates of sailing, sailing days, names of steamers, ports of call and destination, sailing hours, and the registry of the steamers for the succeeding month. There was printed on the form the following:

> This information is desired for transmission to the Postmaster General, in order that he may determine the steamships which will be assigned to carry the United States mails during the period mentioned.

Thereafter plaintiff received a further form from the postmaster to be filled out and returned at once with information as to sailing date, the pier from which the vessel would sail, the time for expected sailing, ports of call, speed of vessel, and its registry.

The form in use during the period from November 5, 1932, to June 30, 1935, contained the following statement:

IMPORTANT

SAFETY.—Steamship companies are answerable to the United States for the safety of the mail intrusted to them, and accountable for any loss or damage resulting to any of such mail by reason of failure on the part of any of their officers, agents, or employees to exercise due care in the custody, handling, or transportation thereof. In case of delinquencies, fines may be imposed or deductions made from the company's pay.

CARTING.—Mails for dispatch by outgoing steamers are delivered from the Varick Street Annex (Laight and Beach Streets), and steamship companies must cart the sacks to the steamers. Each truck (or wagon) must be provided with a man to ride on the tail end so as to prevent interference with the mail or the possibility of a sack working loose and falling, unobserved, into the street.

Unless special arrangements are made, mails are ready for delivery at the Varick Street Annex as follows: Steamers sailing from Brooklyn, one and one-half hours before sailing time; steamers sailing from East River (Manhattan) and Jersey City, one hour before sailing time; steamers sailing from North River (Manhattan) and Hoboken, one hour before sailing time.

A revised form was in use during the period herein subsequent to June 30, 1935. The same information was requested, but instead of the notice on the back of the form previously used there appeared on the face of the revised form the following:

It is understood that the mails shall be carried in accordance with the terms, conditions, and responsibilities prescribed by the Postal Laws and Regulations of the United States (or in accordance with the terms of the contract covering the service, where there is such a contract).

Mails for dispatch by outgoing steamers are delivered from the post office at the times arranged upon, and steamship companies must cart the sacks to the steamers. Each truck (or wagon) must be provided with a man to ride on the tail end so as to prevent interference with the mail or the possibility of a sack working loose and falling, unobserved, into the street.

Plaintiff received the mails tendered by the postmaster at New York through its truckman, who was bonded to plaintiff, and who transported the mail to the steamer. This was done about one hour prior to the sailing of the ship, in accordance with public notice previously issued by the New York post office, showing schedule of sailings designated to carry the mails.

The mails tendered by the post office were accompanied by a post office waybill issued in triplicate for each port at which the particular steamer was scheduled to call. Receipts were taken for the mail by the post office upon its delivery to the truckman; also from the captain of the vessel upon delivery of the mail to the vessel; and also by the captain of the vessel from the postmaster at the point of delivery, after which a copy of the receipted waybill was returned to the postmaster at New York.

The waybill showed in detail the number of sacks of "red label" or registered mail and each port of call at which delivery was to be made by plaintiff. The country of origin of "red label" or registered sacks was shown on the waybill. The waybill also showed the number of sacks of mail designated as "letters and prints" and "parcel post," but the country of origin was not shown for either of these classes.

The procedure in the tender, transportation and delivery of mails from other post offices from which plaintiff's vessels departed was similar to that followed with respect to such vessels departing from New York.

4. During the period November 5, 1932, to August 28, 1938, the period involved in this suit, Section 2254, paragraph 2, Postal Laws and Regulations, provided as follows:

> 2. Steamship companies shall be answerable to the United States for the safety of the mail intrusted to them, and accountable for any loss or damage resulting to any of such mail by reason of failure on the part of any of their officers, agents, or employees to exercise due care in the custody, handling, or transportation thereof. The registered (red label) sacks shall be specially protected during transfers and on board vessels. In case of delinquencies, fines may be imposed or deductions made from the company's pay. Mails for dispatch by outgoing steamers shall be delivered from

> the post office, and steamship companies shall haul the sacks to the steamers. Each truck (or wagon) shall be provided with a man to ride on the rear and protect the mail. The red-label sacks shall be separately delivered to the steamship company's representative at the post office; sacks and seals shall be carefully examined at time of receipt; and when a rack (open) truck is used the sacks shall be covered by a tarpaulin. Unless special arrangements are made, mails shall be ready for delivery at the post office in time, designated by the postmaster, to connect with the conveying steamer.

5. On November 10, 1931, a Postal Convention was entered into between the United States of America, Spain, and the Central and South American countries, which was approved by the President on February 9, 1932 (47 Stat. 1924–56). Article 3 of this Convention reads as follows:

> *Free and gratuitous transit.*—1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter may send to any destination.
>
> 2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches.

The same provision was incorporated in the later Convention of 1936 between the same parties, ratified August 12, 1937, and approved by the President August 20, 1937 (50 Stat. 1657).

6. Plaintiff received compensation from the Post Office Department for the transportation of parcel post mails. Panama refused to pay for the transportation of the other mails on the voyages in question on the ground that it was not liable therefor since none of its own mails were carried by its vessels on the trips in question.

Pursuant to request of this court the Postmaster General transmitted to the court, under seal of the Post Office Department, on July 20, 1939, a certified copy of the Department's journal, dated May 8, 1939, certifying to the General Account-

ing Office the amounts due the plaintiff for the transportation of mails, and a statement of weights and amounts due as determined by the Post Office Department in the sum of $59,157.12, for transportation during the period herein for weights of the respective classes of United States mails and foreign transit closed mails, at the poundage rates shown in the statement attached to the journal. The statement further shows a disallowance of the sum of $1,117.64 claimed by plaintiff for transportation of such mails on 21 voyages where the "vessel called at the Canal Zone." None of the vessels on voyages involved in this suit called at ports in the Republic of Panama. On all of the 21 voyages for which compensation was claimed by the plaintiff, but not certified as due by the Postmaster General because the vessel called at the Canal Zone, the vessels were entered and cleared through the customs authorities of the Canal Zone and there was no entrance or clearance through the Customs Department of the Republic of Panama.

The entire amount claimed by plaintiff was disallowed by the Comptroller General.

Plaintiff's claim does not include any voyages outbound which were used by the Republic of Panama on the return for the transportation of its own mails.

The Republic of Panama never utilized for the carriage of its own mails six of the ships which carried the mails in question, but on voyages other than the voyages in question it did utilize for the carriage of its mails three of the ships which carried the mails in question.

7. There is due plaintiff under the applicable poundage rates provided for in section 2242, Postal Laws and Regulations, Edition 1932, the sum of $60,274.76 for the transportation of the mails for which plaintiff sues.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for the compensation provided for in the Postal Laws and Regulations for the carriage of mail between the United States and Central American ports during the period November 5, 1932, to August 29, 1938.

The amount claimed in the petition is $60,432.28, but the commissioner has found that if the plaintiff is entitled to recover at all, there is due it the sum of $60,274.76, and no exception is taken thereto.

The plaintiff owned all of the stock of the Balboa Shipping Company, a corporation chartered under the laws of the Republic of Panama. This company had 9 steamships registered under the flag of the Republic of Panama which were operated by the plaintiff under a bare boat charter from the Balboa Shipping Company. These ships carried the mails in question.

Plaintiff had no formal contract for the carriage of these mails. Its right to recover rests upon the implied contract, if any, which arose from the following transactions between the parties:

On or about the first of each month the Post Office Department sent plaintiff a blank form to be filled out showing the names of its steamers, the dates of their sailing, the ports of call and destination, and their registry. This form was filled out by plaintiff and returned to the Post Office Department. Thereafter, and shortly before the date of sailing of any particular vessel, defendant sent plaintiff a further form to be filled out giving the name of the vessel, the sailing date, the pier from which the vessel would sail, the time it was expected to sail, its ports of call, its speed, and its registry. The latter form, which was in use between November 5, 1932, and June 30, 1935, contained a statement, a portion of which reads as follows:

> SAFETY.—Steamship companies are answerable to the United States for the safety of the mail intrusted to them, and accountable for any loss or damage resulting to any of such mail by reason of failure on the part of any of their officers, agents, or employees to exercise due care in the custody, handling, or transportation thereof. In case of delinquencies, fines may be imposed or deductions made from the company's pay.

After June 30, 1935, a revised form was used which contained the following:

> It is understood that the mails shall be carried in accordance with the terms, conditions, and responsibilities

prescribed by the Postal Laws and Regulations of the United States (or in accordance with the terms of the contract covering the service, where there is such a contract).

During all the period in question the Postal Laws and Regulations provided for certain compensation for the carriage of the mails.

On November 10, 1931, a Postal Convention was entered into between the United States of America, Spain, and the Central and South American countries, which was approved by the President on February 9, 1932 (47 Stat. 1924–56). Article 3 of this Convention reads as follows:

> *Free and gratuitous transit.*—1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter may send to any destination.
>
> 2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches.

The same provision was incorporated in the later Convention of 1936 between the same parties, ratified August 12, 1937, and approved by the President August 20, 1937 (50 Stat. 1657).

Under section 4016 of the Revised Statutes, as amended, 18 U. S. C. 326, plaintiff was required to take the mail from the United States Post Office when its ships were leaving our ports under penalty of a fine of $1,000 for failing or refusing to do so. The Act of February 6, 1929 (c. 157, 45 Stat. 1153), authorized the Postmaster General to require any steamship to carry mail between the United States and any foreign port "at the compensation fixed under authority of law," and this Act authorized the collector of the port, or other proper officer, to refuse clearance of the vessel if it refused to accept the mail tendered.

Plaintiff accepted and transported the mails in question under the foregoing circumstances.

The Postmaster General recognized liability to pay for the transportation of all the mails carried on the trips in question, except that carried on those voyages where the "vessel called at the Canal Zone." Accordingly, the Postmaster General certified to the General Accounting Office for payment the sum of $59,157.12, but he did not certify for payment $1,117.64, which was the amount claimed for the transportation of those mails where the vessel carrying it called at the Canal Zone.

The Comptroller General disallowed the entire amount. He was of the opinion that liability to pay the charges for transporting the mails rested on the Republic of Panama under Article 3 of the Postal Convention quoted above. The Republic of Panama has denied liability on the ground that it agreed to pay for the carriage of mails only by those vessels which the Republic of Panama used on the same trips for the carriage of its own mail. Since none of these vessels called at ports of the Republic of Panama on any of the trips in question, and did not carry any of its mail, it insisted that it was not liable under the Convention for the transportation charges.

It was the defendant that demanded of plaintiff the service for which it claims compensation and, therefore, the primary liability to pay for these services is on the defendant, unless the inference can be fairly drawn from the conduct of the parties that the plaintiff agreed to look alone to someone else for its compensation. The only basis for saying that the plaintiff did look to someone else for compensation is the fact that it accepted the mails and delivered them with knowledge of the fact that the Republic of Panama had agreed to pay for the transportation of mails "by the ships of their registry or flag which they utilize for the transportation of their own correspondence."

There was no special agreement on the part of Panama to pay for the carriage of the particular mails in question. It merely generally agreed to pay for the transportation of

mails by vessels of its registry or flag which it utilizes for the transportation of its own correspondence. When plaintiff accepted the mails, it did not know whether Panama meant to agree to pay for the carriage of United States mails by any ship of its registry or flag that it ever used for the transportation of its own mails, or whether it meant merely to agree to pay for the transportation of United States mails on those voyages of its ships which also carried its mails.

Certainly, in a case where the agreement of a third party to pay the debt of another is uncertain, no agreement can be implied on the part of the creditor to look alone to the third party for compensation and to absolve from liability the person for whom the service was rendered. Indeed, in the absence of an express agreement on the part of Panama to pay for the carriage of these particular mails, or similar ones, we do not think an inference can arise that plaintiff agreed to look alone to Panama for compensation and to absolve the defendant from liability therefor. And even though there had been an express agreement on Panama's part to pay for the transportation of these particular mails, we do not think an inference would arise from the facts before us that plaintiff agreed to look alone to Panama and to relieve the United States of liability therefor. Certainly the plaintiff did not expressly agree to absolve the defendant from liability, and we know of no fact or circumstance from which it can be implied that it agreed to do so. The plaintiff has the right to demand compensation from the party which demanded the service of it, whatever may have been the agreement between this party and some third party, unless by express agreement or by its conduct it impliedly agreed to relieve of liability the party that demanded the service. So far as the record discloses, it has done nothing to lead defendant to believe that it would look alone to Panama for compensation.

Nor did the defendant in this case, as it did in *Standard Fruit and Steamship Company* v. *United States*, No. 45267, this day decided, disavow liability for the charges; hence, plaintiff had a right to assume that he who demanded the

service intended to pay for it, if the third party did not, and it must be implied that defendant so intended.

It appears from the proof that the plaintiff operated 9 vessels which flew the flag of Panama. Six of these vessels never at anytime were used by the Republic of Panama for the transportation of its own correspondence. Article 3 of the Convention is not susceptible of the construction that Panama agreed to pay for the transportation of mail by these vessels. It agreed only to pay for the transportation of mails by the vessels of its registry or flag which it utilizes for the transportation of its own correspondence.

On voyages other than the voyages in question the Republic of Panama did use three of the nine vessels for the transportation of its mails. Whether or not it is liable for the mails carried by these vessels on other trips involves the proper construction of article 3 of the Postal Convention. Panama construes it one way and the United States another. In case of such a dispute as to the liability of the third party, certainly plaintiff cannot be said to have taken its chances of collecting its money from Panama and to have intended to relieve the United States of liability therefor.

We think the Postmaster General was clearly right in certifying for payment the sum of $59,157.12, but we think he was wrong in disallowing the sum of $1,117.64, the amount claimed for the mail carried on those voyages where the vessels called at the Canal Zone. Panama refused to pay for the mail carried on these voyages as well, and the plaintiff has not relieved the defendant of liability for payment for them, where payment is not received from Panama.

We are of the opinion that the plaintiff is entitled to recover from the defendant the sum of $60,274.76. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRANK J. YAEGER v. THE UNITED STATES

[No. 44331. Decided March 5, 1945. Defendant's motion for new trial overruled June 4, 1945]

On the Proofs

Increased costs under National Industrial Recovery Act; contractor unable to fulfill contract on account of increased costs.—Where plaintiff in February 1933 filed with defendant a bid to furnish the Government at stated prices, based on then prevailing conditions, such specified lumber and lumber products as might be ordered by the defendant during the fiscal year July 1, 1933, to June 30, 1934, which bid was accepted in June 1933 and a formal contract in accordance therewith entered into on June 29, 1933; and where during the period between the submission of the bid and the date of the contract the prices of lumber had increased but the plaintiff continued for some time to furnish such lumber as defendant ordered; and where, after the enactment of the National Industrial Recovery Act lumber prices continued to increase, largely as a result of the passage of that Act, and plaintiff was unable on that account to fulfill his contract; it is *held* that plaintiff is entitled to recover under the provisions of the Act of June 25, 1938.

Same; enactment of National Industrial Recovery Act was chief factor in increasing prices.—It is common knowledge that following the enactment of the National Industrial Recovery Act, prices increased generally, due to many factors, and it is impossible to ascertain with exactness from the proof in the instant case how much of the increase was due to the enactment of that Act, but there can be no doubt that the enactment of the National Industrial Recovery Act was the chief contributing factor.

Same; purpose of Act of June 25, 1938, was to give equitable relief to contractors whose costs were increased as result of National Recovery Act.—In the enactment of the Act of June 25, 1938, Congress did not make it a condition of recovery that the claimant should show precisely how much of the increase in costs was due to the passage of the National Industrial Recovery Act, and it was provided that the Court of Claims was authorized to render judgment, in cases brought under the 1938 Act, "upon a fair and equitable basis."

Same; counterclaim of Government for increased costs due to failure of contractor to fulfill contract on account of passage of National Industrial Recovery Act.—The intent of both the Act of June 16, 1934 (48 Stat. 974) and of the Act of June 25, 1938 (52 Stat. 1197) was to give to contractors the right to recover excess costs of performance of Government contracts where such increases were brought about by the act of the Government

in passing the National Industrial Recovery Act (48 Stat. 195), the avowed purpose of which was to increase prices; and it would, therefore, be contrary to the spirit of these two remedial acts for the Government to recover, on its counterclaim, excess costs of purchasing the goods elsewhere when the contractor had been unable to fulfill his contract on account of the increased costs to which he was put as the result of the passage of the National Industrial Recovery Act.

The Reporter's statement of the case:

Mr. William E. Carey, Jr., for the plaintiff. *Mr. Fred B. Rhodes* was on the brief.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. William A. Stern II* was on the brief.

The court made special findings of fact as follows:

1. This action was brought pursuant to the Act of June 25, 1938 (c. 699, 52 Stat. 1197), conferring jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of the enactment of the National Industrial Recovery Act, June 16, 1933 (48 Stat. 195). Defendant filed a counterclaim seeking to recover excess cost occasioned the defendant by the purchase of lumber and lumber products on the open market or under other contracts following the termination of plaintiff's contract for failure to furnish such lumber and lumber products under his contract.

2. Plaintiff is a citizen of the United States, a resident of Philadelphia, Pa., and is engaged in the retail lumber business at Philadelphia, Pa.

3. In February 1933 plaintiff filed with defendant a bid to furnish to defendant at stated prices certain miscellaneous lumber and lumber products as ordered by the defendant during the fiscal year July 1, 1933, to June 30, 1934, inclusive, and with said bid filed a bid bond with surety thereon. The prices on which the bid was based were the low prices obtaining in January and February 1933, which plaintiff at that time thought would likely obtain during the period of July 1, 1933, to June 30, 1934, inclusive.

4. After the filing of the bid and prior to June 29, 1933, the prices of the miscellaneous lumber and lumber products on which plaintiff had bid increased considerably, and during that time plaintiff endeavored, but without success, to be relieved of his bid which he had learned was the lowest one received by the defendant.

5. During the latter part of June 1933 defendant notified plaintiff that his bid had been approved and accepted, and on June 29, 1933, a formal contract between the plaintiff and the defendant, acting by the Acting Secretary of the Treasury, was signed (TGS–9528), and to it was attached a Standard Government Performance Bond with the Hartford Accident and Indemnity Company as surety thereon.

6. After June 29, 1933, the prices of the lumber and lumber products which plaintiff was obligated by the contract to furnish on orders of the defendant at the prices stated in the contract continued to rise, and by December 1933 these increases in the prices which plaintiff had to pay for the lumber which he was delivering to the defendant under the contract had depleted his working capital to the extent that he became unable to furnish lumber and lumber products as ordered by the defendant. He so notified the Acting Secretary of the Treasury by letter of December 8, 1933.

7. Long prior to December 21, 1933, plaintiff both orally and by letters complained to the Acting Secretary of the Treasury and to the Superintendent of Supplies that the National Industrial Recovery Act, the President's Reemployment Argeement and the applicable code had so increased the prices that he had to pay for lumber and lumber products that he and his business would be destroyed if he was not given relief, and on November 22, 1933, at the suggestion of the Superintendent of Supplies of the Treasury Department, plaintiff wrote a lengthy letter to the Treasury Department, Procurement Division, purporting to itemize his losses and making a claim for $12,900.55. He supplemented this claim by another letter which he wrote to the Procurement Division, Treasury Department, on January 13, 1934, purporting to give additional detailed information.

8. On December 21, 1933, the Director of Procurement, Treasury Department, on the recommendation of the Super-

intendent of Supplies, declared plaintiff in default under his contract, and on December 27, 1933, the Superintendent of Supplies, Treasury Department, wrote a letter to plaintiff declaring him in default, terminating the contract, and telling plaintiff that the lumber and lumber products would be procured from other sources and that the difference in cost, if any, would be charged against plaintiff's account. This was pursuant to article 5 of the contract which provided as follows:

> If the contractor refuses or fails to make deliveries of the materials or supplies within the time specified in Article 1, or any extension thereof, the Government may terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay. In such event, the Government may purchase similar materials or supplies in the open market or secure the manufacture and delivery of the materials and supplies by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby: *Provided*, That the contractor shall not be charged with any excess cost occasioned the Government by the purchase of materials or supplies in the open market or under other contracts when the delay of the contractor in making deliveries is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, * * *.

Prior to the filing of the counterclaim in this suit defendant made no demand on plaintiff for the payment of any excess cost occasioned the defendant by the purchase of lumber or lumber products on the open market or under other contracts, and defendant never at any time made such a demand on plaintiff's surety on the performance bond.

9. For the lumber and lumber products which plaintiff bought from time to time and furnished to defendant under the contract, plaintiff paid $7,541.34 more than he would have had to pay if the prices obtaining in February 1933, when he made his bid, had remained in effect. The amount of $5,000.00 of this additional cost to plaintiff resulted from the enactment of the National Industrial Recovery Act.

10. Plaintiff duly filed a claim for his increased costs pursuant to the Act of June 16, 1934 (48 Stat. 974, 975), within the time therein required. This claim was disallowed by the Comptroller General of the United States.

11. After crediting a saving of $48.77 made by the defendant in some purchases, the total cost of all lumber and lumber products purchased by the defendant in the open market or under other contracts subsequent to the termination of plaintiff's contract and which had been covered by it, amounted to $120,895.39. The cost of these purchases at the prices stipulated in plaintiff's contract would have been only $77,668.05, making an excess cost to the defendant of $43,227.34. Defendant, however, failed to pay plaintiff $501.22 for lumber and lumber products actually furnished by plaintiff under his contract, and deducting this $501.22 from the $43,227.34, leaves a balance of $42,726.12.

The court decided that the plaintiff was entitled to recover. The court further decided that the defendant was not entitled to recover on its counterclaim.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover excess costs incurred as a result of the passage of the National Industrial Recovery Act, *supra*.

In February 1933 he filed with defendant a bid to furnish it at stated prices such specified lumber and lumber products as might be ordered by the defendant during the fiscal year July 1, 1933, to June 30, 1934. His bid was accepted in June 1933. A formal contract was entered into on June 29, 1933.

Between the time plaintiff put in his bid in February and June 29, 1933, the date of the contract, the prices of lumber had increased considerably, but plaintiff continued for some time to furnish such lumber as defendant ordered, although he appealed to defendant to give him relief either by increasing the prices agreed to be paid or by relieving him from the obligation of the contract altogether. However, plaintiff's resources were limited and by December 21, 1933, they were exhausted and, hence, plaintiff was unable to further perform

his contract. On that date the Director of Procurement at the Treasury Department declared him in default, terminated his contract, and notified him that the lumber and lumber products covered by his contract would be procured from other sources and the difference in cost charged to him.

Plaintiff bought from others the lumber and lumber products which he contracted to furnish defendant. The cost of performing his contract up to the date of its cancellation was $7,541.34 more than it would have cost him at the prevailing prices when he put in his bid. Most of this increase came about after the passage of the National Industrial Recovery Act. Just how much was due to its passage it is impossible to ascertain with exactness from the proof. Indeed, it is not susceptible of exact proof. It is common knowledge that many factors entered into the increase in prices during this period. It is impossible to say how many cents of the increase was caused by one factor and how many by another. There can be no doubt, however, that the enactment of the National Industrial Recovery Act was the chief contributing factor.

Congress did not make it a condition of recovery that the plaintiff should show precisely how much of the increase was due to the passage of this Act. It was aware that this could not be done and, so, it authorized us to render judgment "upon a fair and equitable basis." After careful consideration of all the facts and circumstances we have concluded, and have found as a fact, that $5,000 of this increase was caused by the passage of this Act.

COUNTERCLAIM

Defendant has filed a counterclaim for $42,774.91 under article 5 of the contract, which gives the defendant the right, on the contractor's default, to purchase the materials contracted for in the open market or to secure them by contract or otherwise, and to charge the contractor with the excess cost. The commissioner has found that the defendant was actually put to excess costs in this way in the amount of $42,726.12. No exception thereto is taken. We are of opinion, however,

that defendant is not entitled to recover under the facts of this case.

On June 16, 1934, Congress passed an Act (48 Stat. 974, 975) permitting contractors with the United States to recover their excess costs as a result of compliance with the National Industrial Recovery Act. Later, to relieve contractors from the burden of the construction placed by the Comptroller General on this Act, Congress passed the Act of June 25, 1938 (c. 699, 52 Stat. 1197), giving contractors the right to recover excess costs of performance of their contracts with the Government as the result of the enactment of the National Industrial Recovery Act. The intent of both of these Acts was to reimburse a contractor who had fulfilled his contract for his excess costs brought about by the act of the Government in passing the National Industrial Recovery Act, whose avowed purpose was to increase prices. It, therefore, would be contrary to the spirit of these two Acts for the Government to recover excess costs from a contractor where he had been unable to fulfill his contract on account of the increased costs to which he was put on account of the passage of the National Industrial Recovery Act. Had he completed his contract he would have been entitled to a judgment against the defendant for his increased costs. It necessarily follows that the defendant is not entitled to recover from him its excess costs of purchasing the goods where he could not complete his contract to furnish them on account of the passage of this Act. The defendant is not entitled to recover on its counterclaim.

The plaintiff may recover of the defendant the sum of $5,000, his excess costs of fulfilling his contract prior to default. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

JAMES C. SHRIVER AND OWEN E. HITCHINS, RECEIVERS OF THE VANG CONSTRUCTION COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43329. Decided April 2, 1945]

On the Proofs

Government contract; dredging on Ohio River; limitation in specifications on amount of allowable overdepth dredging for which payment would be made.—The plaintiff entered into a contract with the Government covering dredging work on the Ohio River. The contract depth of dredging was 11 feet below specified normal pool elevation. Since an exact depth is impossible to obtain in dredging, the contractor was to be paid for dredging for not more than one foot below the contract plane; the maximum amount of allowable overdepth dredging, as shown by the specifications, was estimated to be 160,000 cubic yards, place measurement; and the maximum amount of allowable overdepth dredging for which payment would be made was not to exceed 120,000 cubic yards, which is 75% of the allowable overdepth dredging. Contractor's claim, after certain adjustments, is for payment for 75% of 187,528 cubic yards actually overdredged, or 140,687 cubic yards.

It is *held* that in view of the precise wording of the specification, "that the maximum amount of allowable overdepth dredging for which payment will be made shall not exceed 120,000 cubic yards," allowance must be restricted to 120,000 cubic yards, and plaintiff is not entitled to recover.

Same.—In no event would plaintiff be entitled to pay for overdredging where there was already an 11-foot plane and no dredging was required under the contract.

Same; claim based on assumptions from estimates.—Plaintiff also claimed it was entitled to be paid extra costs by reason of the fact that the dredging proved to be more shallow than had been represented, thus extending over a broader area and being more expensive. The area ultimately dredged, as ascertained by the use of planimeter, was 121.4 acres, from which must be eliminated 5.13 acres where overdepth dredging was done notwithstanding the contract depth already existed, leaving 116.27 acres of dredging, which was 17.07 acres in excess of the 99.2 acres that the plaintiff had estimated to be the area to be dredged. It is *held* that the evidence totally fails to justify plaintiff's claim on this item, which is based entirely on assumptions made from estimates.

The Reporter's statement of the case:

Mr. Louis M. Denit for the plaintiff. *Drew & Cain* and *Brandenburg & Brandenburg* were on the brief.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiffs are the duly appointed and qualified receivers of The Vang Construction Company and have filed this suit pursuant to an order of court in the receivership proceedings. The Vang Construction Company is a corporation of the State of Maryland. The term "plaintiff" as used herein will mean either The Vang Construction Company or the receivers, as may by the context appear.

2. On October 26, 1932, the plaintiff entered into a contract with the defendant represented by Fred W. Herman, major, Corps of Engineers, U. S. A., as contracting officer, whereby plaintiff agreed to furnish all labor and materials, and perform all work required for dredging at Twelve Pole Bar, below U. S. Lock No. 28, Ohio River, beginning at a point approximately 3,800 feet below the lower end of the lower guide wall and extending downstream a distance of about three miles, all as indicated in paragraphs 1, 2 and 12 of the specifications and maps referred to in paragraph No. 6 thereof, a total of approximately 360,000 cubic yards, for the consideration of 30 cents per cubic yard, in accordance with specifications and drawings designated as follows: "Specifications, serial No. 33–32, issued by the U. S. Engineer Office, Huntington, West Virginia, under date of August 11, 1932," and "Maps marked 'Ohio River, Twelve Pole Bar, Proposed Dredging', dated August 10, 1932, sheets 1, 2, and 3."

The contract provided that the work was to be commenced within 30 calendar days after the date of receipt of notice to proceed and be completed within 130 calendar days after date of receipt of notice to proceed, provided, that should the total quantity of material to be paid for, actually removed under the contract, exceed the quantity on which bids were canvassed, as stated in paragraph No. 12 of the speci-

fications, additional time would be allowed at the rate of three calendar days for each 5,000 cubic yards of such estimated quantity.

Articles Nos. 2, 3, and 4 of the contract provided:

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those

shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

The specifications provided that the work should consist of the removal and disposal of all materials (except ledge rock and material that could not be removed or buried to a clear depth of not less than two feet below project depth by the agreed plant without blasting) encountered above the planes 11 feet below specified normal pool elevation and within the limiting lines of the maps referred to in the contract.

Paragraph No. 5 of the specifications provided that partial payments were to be based on excavation and deposition made in accordance with the specifications.

Paragraph No. 9 thereof stated that the present condition of the channel was shown on the maps that were referred to in the contract.

Paragraphs Nos. 11 and 12 of the specifications (omitting matter not here involved) provided:

11. *Overdepth dredging and side slopes.*—To cover unavoidable inaccuracies of dredging processes, material actually removed to a depth of not more than one foot below the required depth will be estimated and paid for at full contract price provided that the maximum amount of allowable overdepth dredging for which payment will be made shall not exceed 120,000 cubic yards place measurement from Twelve Pole Bar. * * *

(a) The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into

the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredging or excessive side-slope dredging* and will not be paid for.

12. *Quantity of material.*—The total estimated quantities of material necessary to be removed from within the specified limits, exclusive of allowable overdepth, to complete the work described in paragraph 2 are as follows:

At Twelve Pole Bar, 240,000 cubic yards, place measurement

* * * * *

(a) These amounts, plus 75 percent of the maximum quantity of estimated allowable overdepth, will be used as a basis for canvassing bids, and for determining the amount of the consideration of the contract. (See paragraph on performance bond in invitation for bids.)

(b) The maximum amount of allowable overdepth dredging is estimated to be as follows:

At Twelve Pole Bar, 160,000 cubic yards, place measurement

* * * * *

(c) Within the limits of available funds, the United States reserves the right to increase or decrease the quantity of dredging to be done as above estimated by such amount as will complete the work specified in paragraph 2 hereof, and final payment will not be made until the work is so completed.

Paragraph 13 of the specifications stated that the material to be removed was believed to be sand and gravel but bidders were expected to examine the work and decide for themselves as to its character and make their bids accordingly.

The method of measurement was provided for in paragraph No. 15 of the specifications. The material removed was to be measured by the cubic yard in place by means of soundings or sweepings taken before and after dredging. The maps referred to in the contract were believed to represent accurately the average existing conditions; "but," the paragraph continued, "the depths shown thereon will be verified and corrected, if necessary, by soundings taken shortly before dredging under these specifications is begun in any locality. Soundings or sweepings will be made, as far

as practicable, of the entire area dredged, as the work progresses, and, so far as practicable, the contractor will be advised of the result before anchors are shifted."

Paragraph No. 17 of the specifications was as follows:

> 17. *Shoaling.*—Should the last examination of the contract work, extended to include the entire area, show shoaling for which the contractor is evidently not responsible, and which shall include shoals in the finished channel formed by the natural lowering of side slopes, between the time of dredging and that of the last examination herein referred to, redredging at the contract price, so far as permitted by available funds, may be done if agreeable to both the contractor and the contracting officer.

Under paragraph No. 18 of the specifications, it was the duty of the contracting officer or his agents to indicate by stakes, ranges, or otherwise, the location and limits of the work to be done.

Copy of the contract, together with specifications and maps forming part of the contract, is in evidence and made part of these findings by reference.

3. The plaintiff completed its operations on the contract and the work was accepted by the Government July 30, 1934. Notice to proceed was received November 15, 1932, thus fixing the date for completion on or before March 25, 1933.

During the course of the work the contract was modified by two change orders. Change Order No. 1, issued February 1, 1933, provided that, due to the unfavorable season of the year, work would not be required "during the period between February 15 and June 15, inclusive," and that this permissible stoppage would not "be considered in computing the time allowed for completion, or in computing liquidated damages," and that no additional time for completion on account thereof would be allowed.

Change Order No. 2 was issued August 7, 1933, and recited:

> Reference is made to Articles 3 and 4 of your Contract No. W516eng.-630, dated October 26, 1932, for dredging at Twelve Pole Bar.
>
> It has been determined that in view of the discovery of subsurface conditions at the site of the work materially differing from those shown on the drawings or indicated in the specifications, which conditions are the

existence of an unexpectedly and unusually large percentage of boulders and loose rock mixed in the sand and gravel of the river bed, this percentage being from 4 to 15 percent of the total material to be dredged; and in view of the fact that the above conditions will cause the work under the contract to be extended into a season unfavorable for dredging in the Ohio River which will cause material while being dredged or placed on spoil banks to shift and require further work to place it in its final position, also will make inspection and survey work in connection with this contract difficult and expensive and also will cause some disturbance to navigation on account of the presence of your plant in the channel during the frequent periods of strong currents due to high water, it is necessary and in the best interests of the United States to modify said contract in certain particulars, as follows:

"Increase the unit bid price from thirty ($0.30) cents per cubic yard to fifty-five ($0.55) cents per cubic yard, applying to work performed at Twelve Pole Bar only, on and after May 3, 1933, only.

"Add to paragraph 3 of the specifications, as amended by Change Order No. 1, dated February 1, 1933, the following words: 'No work will be required during the period December 15, 1933, and May 31, 1934, inclusive. If he so desires, the contractor may work during any part or all of this period upon giving written notice of his desire to the contracting officer, but whether he works or not, no part of the period above named will be considered in computing the time allowed for completion. If, however, the contractor elects to work during any part of the period above named, and the monthly average work accomplished is any percentage less than 30,000 cubic yards, and the contracting officer maintains an inspection force during this time for the purpose of supervising the work, the contractor will be charged this same percentage of the cost of maintenance of such inspection force.'

"Approximately 358,000 cubic yards of material, including overdepth, will be affected by this change. The estimated increased cost is $89,500."

It is understood and agreed that on account of the foregoing modification of said contract additional time will be allowed. The extent of this additional time shall be 238 calendar days, exclusive of the period during which no work will be required, as stated above.

It is further understood and agreed that all other terms and conditions of said contract, as modified by Change Order No. 1, shall be and remain the same.

The change orders had the effect of extending the contract time for completion to September 3, 1934.

4. The maximum depth of allowable overdepth dredging was one foot. This depth evenly applied to 160,000 cubic yards of excavation, the estimated maximum allowable overdepth dredging referred to in Specification No. 12 (b), represents 99.2 acres. The acreage thus computed was used by the plaintiff in preparing its bid.

The reason for the provision in the contract allowing overdepth dredging was that in dredging to the plane of 11 feet it was inevitable that there would be a certain amount of dredging below that depth. Dredging to an exact depth is unknown and practically impossible. Where the channel depth was already 11 feet there could be no overdepth dredging, and overdepth dredging was not a requirement of the contract in any part of the channel.

5. In certain areas where the depth was already 11 feet or over, the plaintiff nevertheless dredged between the 11-foot and 12-foot planes.

In such areas within the new channel limit the amount so dredged before May 3, 1933, is impracticable to estimate.

In such areas, between the two planes, within the new channel limit the plaintiff removed 9,749 cubic yards after May 2, 1933; outside the new channel limit in territory marked by defendant for dredging 183 cubic yards were removed in that period.

In all, the plaintiff removed a known quantity of 9,932 cubic yards between the 11- and 12-foot planes, where the depth before dredging was 11 feet or over, and this dredging was subsequent to May 2, 1933.

In such areas, within the new channel limit, dredged after May 2, 1933, between the two planes, the material in place immediately before dredging was 12,284 cubic yards. Outside the new channel limit, in areas that had concededly been marked by defendant for dredging, such quantity was 728 cubic yards.

In all, the material in place between the two planes, before dredging, in the areas where 9,932 cubic yards were removed, was 13,012 cubic yards.

6. After May 2, 1933, certain areas were redredged because of shoaling between dredging seasons. All these areas were within the new channel limit, and where the ground surface before dredging was less than 11 feet in depth. This redredging amounted to 1,107 cubic yards between the 11-foot and 12-foot planes. The quantity of material actually in place, between the two planes, in these shoal areas, before dredging, was 2,348 cubic yards.

7. In areas within the new channel limit where the predredging ground surface was less than 11 feet in depth from the normal pool level, the plaintiff removed 1,882 cubic yards before May 3, 1933, which was all the material then and there in place.

After May 2, 1933, the plaintiff removed by dredging between the two planes, within the new channel limit where the ground surface was less than 11 feet in depth, 143,519 cubic yards. The yardage there in place, before dredging, was 183,918 cubic yards.

8. The quantity of material shown in Findings Nos. 5, 6, and 7, as in place, is 201,160 cubic yards, of which 1,882 cubic yards related to dredging before May 3, 1933, and 199,-278 cubic yards to dredging after May 2, 1933. A mass of 201,160 cubic yards, uniformly one foot thick, would cover an area of 124.7 acres, 1,882 cubic yards, 1.2 acres, and 199,278 cubic yards, 123.5 acres.

9. On or about September 26, 1934, the defendant made its last payment on the contract, which was received by the plaintiff under protest.

Defendant's payments under the contract are summarized as follows:

Dredging prior to May 3, 1933:	
Material removed above 11 feet—1,761 cu. yds. at 30¢	$528.30
Payable overdepth dredging—543 cu. yds. at 30¢	162.90
Dredging after May 2, 1933:	
Material removed above 11 feet—168,886 cu. yds. at 55¢	92,887.30
Payable overdepth dredging—124,790 cu. yds. at 55¢	68,634.50
295,980 cu. yds	162,213.00

The plaintiff claims herein that payments under the contract should be $176,787.15, which may be summarized as follows:

Dredging prior to May 3, 1933:	
Material removed above 11 feet—1,761 cu. yds. at 30¢	$528.30
Payable overdepth dredging—1,411 cu. yds. at 30¢	423.30
Dredging after May 2, 1933:	
Material removed above 11 feet—168,886 cu. yds. at 55¢	92,887.30
Payable overdepth dredging—150,815 cu. yds. at 55¢	82,948.25
322,873 cu. yds	176,787.15

This is $14,574.15 in excess of the total paid. There is no dispute as to payments made or material removed above the 11-foot plane. Plaintiff sues for payment on 26,893 cubic yards of allowable overdepth dredging, which it claims is payable dredging.

The overdepth dredging thus paid for was 125,333 cubic yards of material. Of this amount 5,333 cubic yards was defendant's estimate of material dredged in shoals accumulated between dredging seasons and paid for at the rate of 55 cents per cubic yard, in the amount of $2,933.15. The remainder of 120,000 cubic yards of overdepth dredging, paid for, was the limit provided for in Paragraph No. 11 of the specifications, quoted hereinabove in Finding No. 2, which the defendant has thus applied, and which is 75 percent of an allowable overdepth of 160,000 cubic yards.

The total of 322,873 cubic yards here claimed by the plaintiff is based on an actual overdepth dredging between the 11-foot and 12-foot planes of 152,226 cubic yards, and is not limited to 160,000 cubic yards or a percentage thereof.

10. Actual dredging by plaintiff between the 11-foot plane and the 12-foot plane amounted to at least 152,226 cubic yards. This cubic yardage, one foot thick, would extend over 94.4 acres.

Estimate of the maximum amount of allowable overdepth dredging (Paragraph 12 (b) of the specifications, Finding No. 2 herein) was 160,000 cubic yards. This cubic yardage, one foot thick, would extend over 99.2 acres.

The maximum amount of possible overdepth dredging, that is to say one foot thick between the 11-foot and 12-foot planes, estimated from surveys: (1) within the channel limits, (2) within areas incorrectly set with channel markers by the defendant's surveyors, and (3) within areas redredged because of shoaling between dredging seasons, was 188,876 cubic yards. This cubic yardage, one foot thick, would extend over 117.1 acres.

In the course of the work there was a maximum of possible overdepth dredging, that is to say one foot thick between the 11-foot and 12-foot planes, estimated from surveys, within areas dredged beyond that required to produce an 11-foot plane in channel limits, amounting to 12,284 cubic yards. This cubic yardage, one foot thick, would extend over 7.6 acres.

11. In actual dredging operations it is not possible to dredge to a precise plane. The plane actually dredged to is irregular in contour. The estimated area dredged, ascertained by use of chart and planimeter, was 113.98 acres, exclusive of 5.13 acres dredged beyond that required to produce an 11-foot plane in channel limits.

This use of chart and planimeter indicates an acreage as follows:

	Acres
Area dredged within channel limits where predredging depth was less than 11 feet	113.58
Area dredged outside channel limits due to incorrect setting of channel markers	.40
Area dredged where predredging depth was 11 feet or more	5.13
Area redredged because of shoaling between dredging seasons	2.29

The cubic yardage in those areas between the 11-foot and 12-foot planes, assuming level contours and no voids, would be by calculation as follows:

Acres	*Cubic yards*
113.58	183,243
.40	645
5.13	8,276
2.29	3,694
121.40	195,858

12. The cost of dredging per cubic yard is greater in shallow areas than in areas where the material to be dredged is in a comparatively large and locally concentrated mass.

The plaintiff's original estimate of the area to be dredged was 99.2 acres. The area dredged, determined by use of chart and planimeter, turned out to be 121.4 acres, an increase of 22.2 acres.

Paragraph No. 12 of the specifications (see Finding No. 2 herein) gave 240,000 cubic yards, place measurement, as the total estimated material to be removed exclusive of allowable overdepth, and paragraph No. 11 thereof gave 120,000 cubic yards as the maximum payable allowable overdepth, a total of 360,000 cubic yards on which the initial consideration of 30 cents per cubic yard was based.

A mass of 360,000 cubic yards, spread evenly over 99.2 acres, is 2.2494 feet in depth. Over 121.4 acres it is 1.838 feet.

Paragraph 12 (b) of the specifications states that the maximum of allowable overdepth dredging is estimated to be 160,000 cubic yards, place measurement. If this be added to the estimated yardage of 240,000 cubic yards overlying the overdepth, the aggregate of dredging is 400,000 cubic yards.

A mass of 400,000 cubic yards, spread evenly over 99.2 acres, is 2.4993 feet in depth. Such a mass, over 121.4 acres, is 2.0423 feet.

Plaintiff bases its claim herein on 322,873 cubic yards of dredging (Finding No. 9).

A mass of 322,873 cubic yards, spread evenly over 99.2 acres, is 2.0174 feet in depth. Over 121.4 acres, it is 1.6485 feet deep.

13. The contract drawings indicate that in about 27 percent of the area to be dredged the cut down to the 11-foot plane ranged from 1.25 feet to a maximum of 2.26 feet in depth, nine percent from one foot to 1.25 feet, 46 percent from .5 foot to one foot, and 18 percent from zero to .5 foot.

More detailed soundings just before the dredging gave

corresponding depths as follows: 23 percent from 1.25 feet to a maximum of 2.81 feet; 16 percent from one foot to 1.25 feet; 49 percent from .5 foot to 1.25 feet; and 12 percent from zero to .5 foot.

14. What the surface contour of the material dredged would have been had it been confined to 99.2 acres instead of 121.4 acres is not possible of estimation. There is no way of ascertaining what extra cost plaintiff was put to in dredging 121.4 acres instead of 99.2 acres, assuming the same quantity of material in both areas.

Out of 121.4 acres plaintiff spent 7½ months in dredging 99.2 acres. More time would have been required to dredge the 99.2 acres had all the material in the 121.4 acres been present in the 99.2 acres so dredged. It does not satisfactorily appear what this excess time would be.

15. The closing payment on the contract was made by the defendant's general accounting officer December 13, 1935. Prior thereto, on or about March 25, 1935, the plaintiff presented a claim to the district engineer, U. S. Engineer Office, Huntington, West Virginia, which was eventually forwarded to the General Accounting Office for settlement.

This claim comprised four items as follows:

Item No. 1:		
Additional material removed above 11-foot plane:		
(a) Prior to May 3, 1933, 431 cu. yds. at 30¢	$129.30	
(b) After May 2, 1933, 6,687 cu. yds. at 55¢	3,677.85	
		$3,807.15
Item No. 2:		
Additional material removed between 11-foot and 12-foot planes:		
(a) Prior to May 3, 1933, 868 cu. yds. at 30¢	260.40	
(b) After May 2, 1933, 26,025 cu. yds. at 55¢	14,313.75	
		14,574.15

Item No. 3:

Total estimated cubic yardage		$358,000	
Less:			
Allowed in final estimate	281,482		
Included in Item No. 1 (b)	6,687		
Included in Item No. 2 (b)	26,025		
		314,194	
		43,806	
43,806 cu. yds. at 55¢			$24,093.30

Item No. 4:

Additional costs due to shallow-face dredging:		
Labor	$9,609.30	
Power	5,478.43	
Material	6,265.23	
Rental on suction dredge equipment	10,437.61	
Use of dipper dredge equipment	36,939.08	
Administration	7,313.42	
Overhead	7,604.31	
		83,647.38
Total of claim		126,121.98

The Comptroller General entertained the claim and December 13, 1935, made the following allowance and payment thereon, bringing the closing payment on the contract to $162,213.00, as shown in Finding No. 9:

Item No. 1:

(a) 431 cu. yds. at 30¢	$129.30
(b) 5,628 cu. yds. at 55¢	3,095.40
	3,224.70

The Comptroller General disallowed all other items of the claim so presented, and they have not been paid in whole or in part.

February 6, 1936, the plaintiff accepted the check in payment under protest and expressly reserved the right to proceed against the United States in this Court for the balance of the items claimed.

The court decided that the plaintiffs were not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The contractor in this case undertook dredging work for the defendant at Twelve Pole Bar, below U. S. Lock No. 28, Ohio River, for a distance of about three miles. The price named was 30 cents per cubic yard.

In the course of dredging there was discovered "an unexpectedly and unusually large percentage of boulders and loose rock mixed in the sand and gravel of the river bed." The defendant therefore issued a change order increasing the contract price to 55 cents per cubic yard, "applying to work performed at Twelve Pole Bar only, on and after May 3, 1933, only."

There is no question about the effectiveness of this order. An appropriate extension of time for performance was given. No delay is in the case. The dispute is over the amount of compensation to which the contractor was entitled under the terms of the contract. Those terms are interpreted differently by plaintiff and defendant. The claim here sued on was presented to the administrative office, which forwarded it to the Comptroller General for settlement. The Comptroller General settled it, adversely to the claimant, and from this settlement no appeal was possible. Lack of compliance with formalities was not raised against the claimant by defendant's accounting officers.

The contract depth of dredging was 11 feet below specified normal pool elevation. But since an exact depth is impossible to attain in practice the contractor was to be paid for dredging below the contract plane but not beyond one foot. If he dredged deeper than the maximum of one foot, he would not be paid for the excess; if he dredged less than the one-foot allowance he would be paid only for the amount actually dredged. If the channel depth was already 11 feet, there was to be no dredging. The allowable overdepth dredging was simply a one-foot tolerance, payable if done in the course of attaining the 11-foot depth. But overdepth dredging was not required.

The specifications stated that the maximum amount of allowable overdepth dredging was estimated to be 160,000 cubic yards, place measurement. All stated quantities were in terms of place measurement. The maximum amount of allowable

overdepth dredging, *for which payment would be made*, was not to exceed 120,000 cubic yards.

Thus the estimated amount of allowable overdepth dredging was 160,000 cubic yards; the amount of payable overdepth dredging was stipulated to be 120,000 cubic yards. The one is 75% of the other.

The estimated quantity of material to be removed, exclusive of allowable overdepth was 240,000 cubic yards, and the specifications went on to provide that this amount of 240,000 cubic yards, plus 75% of the maximum "estimated" allowable overdepth, would be used as a basis for canvassing bids and determining the contract price. The estimated amount of allowable overdepth being 160,000 cubic yards, 75% thereof would be 120,000 cubic yards, which, added to 240,000 cubic yards, makes an estimated maximum quantity of pay dredging 360,000 cubic yards.

As it turned out there were at least 322,873 cubic yards dredged, but the defendant paid for 295,890 cubic yards only, on the ground that only that amount was payable under the terms of the contract.

There being no dispute as to the amount of material removed above the 11-foot plane, and the correctness of the settlement therefor, the claim is narrowed down to the amount of payable overdepth dredging.

Due to a change order, issued to meet unforeseen conditions, the price was increased to 55 cents from 30 cents per cubic yard beginning May 3, 1933. The defendant paid for overdepth dredging as follows:

Prior to May 3, 1933:	
543 cu. yds at 30¢	$162.90
After May 2, 1933:	
124,790 cu. yds at 55¢	68,634.50
125,333 cu. yds	68,797.40

The plaintiff claims settlement should have been as follows:

Prior to May 3, 1933:	
1,411 cu. yds. at 30¢	$423.30
After May 2, 1933:	
150,815 cu. yds. at 55¢	82,948.25
152,226 cu. yds	83,371.55

The difference in quantities is 26,893 cubic yards, with a claim of $14,574.15.

What the defendant did in settlement was to allow the plaintiff 5,333 cubic yards for material dredged in accumulated shoals, and to that add 120,000 cubic yards as the maximum payable overdredging. There appears to be no dispute as to this item of additional shoal dredging and eliminating the 5,333 cubic yards from consideration, the issue is whether plaintiff is to be paid for 146,893 cubic yards of overdredging, or for only 120,000 cubic yards as the payable maximum.

It is understood that plaintiff claims the payable maximum to be not 120,000 cubic yards, which is 75% of 160,000 cubic yards, the specified estimated allowable maximum, but 75% of 195,858 cubic yards, which is the calculated possible overdepth dredging in the areas actually dredged, including 5.13 acres unnecessarily overdredged in channel limits, and 75% of 195,858 cubic yards is 146,893 cubic yards. See Finding No. 11 for other details. An area of 5.13 acres represents 8,276 cubic yards between the 11-foot and 12-foot planes, which reduces the gross of 195,858 cubic yards to 187,582 cubic yards, and 75% of 187,582 cubic yards, is 140,687 cubic yards, a reduction of 6,206 cubic yards. In no event would plaintiff be entitled to overdredging where there was already an 11-foot plane and no dredging of any sort required.

This difference of 6,206 cubic yards reduces the claimed quantity of 26,893 cubic yards to 20,687 cubic yards. The only overdepth dredging in areas where the depth was already 11 feet and no dredging therefor required and for which we have figures, occurred after May 2, 1933. See Finding No. 5. Computing 6,206 cubic yards at 55 cents per cubic yard, the new price, gives us $3,413.30, which, deducted from $14,574.15, leaves *$11,160.85 for 20,687 cubic yards* as that part of plaintiff's claim now to be considered.

Paragraph No. 11 of the specifications provides that:

> To cover unavoidable inaccuracies of dredging processes, material actually removed to a depth of not more

> than one foot below the required depth will be estimated and paid for at full contract price provided that the maximum amount of allowable overdepth dredging for which payment will be made shall not exceed 120,000 cubic yards place measurement from Twelve Pole Bar.

The maximum limitation of 120,000 cubic yards is specific. The specifications estimated the "maximum amount of allowable overdepth dredging" to be 160,000 cubic yards. The maximum payable overdepth dredging of 120,000 cubic yards is thus 75% of the estimated maximum allowable overdepth dredging.

The specifications also estimated the quantity of material to be removed, exclusive of overdepth, to be 240,000 cubic yards, and went on to say that this quantity of 240,000 cubic yards, "plus 75 per cent of the maximum quantity of estimated allowable overdepth, will be used as a basis for canvassing bids, and for determining the amount of the consideration of the contract."

Since 75% of the maximum quantity of estimated allowable overdepth was 120,000, this gave a total of 360,000 cubic yards of estimated payable dredging, and 400,000 cubic yards of required and allowable dredging. The difference of 40,000 cubic yards represents the quantity that might permissibly be dredged, for which no payment would specifically be made.

In view of the precise wording of the specification, "that the maximum amount of allowable overdepth dredging for which payment will be made shall not exceed 120,000 cubic yards," allowance must be restricted to 120,000 cubic yards. The specification does not say 75% of the actual overdredging and the wording of the contract may not be altered. There is no room for the inference that plaintiff would make.

But the plaintiff's claim is not confined to the contract price of unpaid overdredging. It says it is entitled to be paid extra costs arising because the dredging was shallower than represented, extending over a broader area.

The contract did not guarantee or represent that there would be 360,000 cubic yards of payable dredging. The

overburden of 240,000 cubic yards was given expressly as an estimate. The underlying material, that is to say, the material between the 11-foot and 12-foot planes, was also expressly estimated, and the estimate was 160,000 cubic yards, of which the maximum payable was 120,000 cubic yards.

If 160,000 cubic yards of material is evenly laid out, one foot in depth, it will cover 99.2 acres. This acreage was used by the plaintiff in preparing its bid.

With a given amount of material, the cost per cubic yard of dredging would increase as the area dredged increased. So-called shallow-face dredging is more expensive per cubic yard than localized dredging.

By the use of planimeter it is ascertained that the area ultimately dredged was 121.4 acres. Eliminating 5.13 acres where overdepth dredging was done notwithstanding the contract depth already existed, leaves 116.27 acres of dredging. This is 17.07 acres in excess of the 99.2 acres that the plaintiff had counted on as the area to be dredged.

Plaintiff's claim on this phase of the case is the bulk of the entire claim. The evidence totally fails to justify plaintiff's claim on this item. It is based entirely on assumptions made from estimates. This is not a basis for the allowance of a claim.

Plaintiff is not entitled to recover and its petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION, IN ITS OWN RIGHT, AND FOR THE USE AND BENEFIT OF THE VANG CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 44010. Decided April 2, 1945]

On the Proofs

Government contract; supplemental agreement between receivers of contractor and surety on contractor's performance bond not an assignment of claim under R. S. 3477.—Where contractor entered into a unit-price contract with the Government for the construction of a lock and dam across the Allegheny River, and upon appointment of receivers for the contractor, during progress of the work, plaintiff, as surety on contractor's performance bond, entered into a supplemental contract with the Government and the receivers to take over and complete the work in accordance with the original contract; it is *held* that the supplemental contract did not amount to an assignment by the receivers of a claim against the Government within the meaning of section 3477 of the Revised Statutes.

Same; requirement of defendant's inspector not unreasonable or arbitrary.—The first item of plaintiff's claim is for alleged excess cost of reconstructing the first of two concrete caissons which the contractor, with the consent of the defendant, elected to use as the foundation for the abutment of the dam. It is *held* that the breaking of the caisson was not due to any unreasonable or arbitrary requirement of defendant's inspector as to the quality of concrete used and plaintiff is not entitled to recover.

Same; inspector's ruling not submitted to contracting officer.—Where contractor accepted the instruction and ruling of the inspector without requesting a decision of the contracting officer, as required by the provisions of the contract in such cases; there is no ground for recovery.

Same; faulty method of handling caisson by contractor.—Even if it be assumed that the inspector exceeded his authority under the specification provisions relating to concrete and that plaintiff is not barred by failure to protest to the contracting officer; it is *held* that on the evidence adduced it is shown that the break in the caisson was not due to the weakness of the concrete but to faulty method of handling the caisson on the part of the contractor.

Same; proof shows no misrepresentation by defendant as to subsurface conditions.—As to the second item of the claim, for alleged loss of profit and excess cost of constructing the third section of the cofferdam for the final section of the dam across the river where it joined the navigation lock; the basis of this claim being that defendant by misrepresentations in the specifications and drawings as to subsurface conditions at the lock site delayed the contractor in completing the lock until winter weather and high water, entailing increased cost of operation; it is *held* that the proof conclusively shows that defendant made no such misrepresentation as to subsurface conditions as to render defendant liable for damages as for a breach of contract, and plaintiff is not entitled to recover.

Same; liquidated damages; proof does not show defendant responsible for delay.—As to the third item of the claim for remission of liquidated damages deducted for delay in completion of the contract, where no protest or appeal was taken, as required by the contract; it is *held* that the proof does not establish that defendant was responsible for this delay in completion of the entire work by the contractor and the plaintiff, and there can be no recovery.

The Reporter's statement of the case:

Mr. Louis M. Denit for plaintiff. *Brandenburg & Brandenburg* on the brief.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff was surety on a performance bond of The Vang Construction Company, a contractor with the Government, and, having completed the contract work upon refusal of receivers appointed July 11, 1934, for the contractor to do so, sues in its own right and for the use and benefit of the contractor to recover $50,333.12, representing $29,378.18 as its claimed loss and damage and $20,954.94 as the loss and damage due the original contractor. The contract was for the construction of a lock and dam across the Allegheny River.

Plaintiff took over the work July 13, 1934, and completed it on October 27, 1934. The receivership proceedings against the contractor were terminated and the receivers discharged on November 4, 1936.

The total amount of $50,333.12 claimed is made up of three items, first, $8,143.88, excess cost of reconstructing a concrete caisson alleged to have been due to arbitrary action of defendant in requiring the contractor to use unworkable concrete; second, $26,146.32, lost profit and excess cost in the construction of the third and final section of a dam cofferdam alleged to have been due to delay resulting from misrepresentation by defendant of sub-surface conditions in the lock area and the additional work required on account of such misrepresentation; and, third, liquidated damages of $16,042.92 alleged to have been illegally charged and collected.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The Vang Construction Company, hereinafter sometimes referred to as the "contractor," was at all times herein mentioned a Maryland corporation which since 1910 has been engaged in railroad and dam construction work. Plaintiff is, and at all times hereinafter mentioned was, a Maryland corporation. It was the surety under the contract involved in this suit and, after the appointment of receivers for the contractor who elected not to complete the contract, it entered into a supplemental agreement with defendant under which plaintiff undertook to complete the work. Plaintiff brings this suit in its own right and for the use and benefit of the contractor.

2. November 9, 1932, the contractor entered into a contract with defendant whereby the contractor agreed to furnish all labor and materials and perform all work required for constructing New Lock and Dam No. 2 on the Allegheny River approximately five miles from Pittsburgh, Pennsylvania, for the consideration of unit prices set out in the contract. The estimated consideration was shown as $1,190,251.48 which was computed on the unit prices bid by the contractor and accepted by the defendant for estimated quantities of the various items involved. The contractor furnished a performance bond in the penal sum of $595,125.74 upon which plaintiff was surety.

3. The contract provided that the work should be commenced within 10 calendar days after date of receipt of notice to proceed and be completed within 450 calendar days after date of receipt of such notice. The contractor received notice to proceed on December 7, 1932, which thereby fixed the completion date of the contract as March 1, 1934. However, the contractor, without objection of defendant, commenced prosecution of the work on October 24, 1932, and by the date of receipt of the notice to proceed had accomplished a substantial amount of work. Defendant accepted the work as complete October 27, 1934, that is, 689 calendar days after December 7, 1932.

4. The contract was executed on the Standard Government Form of Contract for construction work (Standard Form No. 23). The plans, drawings and specifications were made a part of the contract and they provided in detail how the work was to be carried out. The contract appears in the record as plaintiff's exhibit no. 1 and the specifications as defendant's exhibit no. 7.

5. Among the standard provisions appearing in the contract were art. 3 authorizing changes and calling for an equitable adjustment for increases and decreases; art. 4 relating to an equitable adjustment for unforeseen or changed conditions; art. 5 concerning payment for extra work or material ordered in writing; art. 9 relating to delays, liquidated damages, notice of delay by the contractor, and findings with reference thereto by the contracting officer, and art. 15 providing for the determination by the contracting officer of disputes concerning questions of fact subject to appeal to the head of the department.

6. The specifications also contained certain general provisions which included the following:

> The contracting officer shall have the power to prescribe the order for executing the work in all its parts. Construction of the dam shall be planned so as not to interfere with navigation and shall start with the construction of the abutment and shall proceed toward the lock in successive cofferdams. Not more than 1,000 feet of the width of the river between the face of the abutment and the face of the river wall of the lock shall be obstructed by cofferdams or permanent work before

the lock is complete in respect to all essential parts and ready for operation. After the lock, guide and guard walls have been completed, the gates, valves, operating machinery, piping system and steam power plant have been installed, the cofferdam for the lock removed and the approaches cleared to the depth specified on the drawings, the lock chamber and culverts cleaned of all rubbish, and after all parts essential to the operation of the lock have been tested and found to be in good operating condition and acceptable to the contracting officer, the contractor will be permitted to proceed with the construction of the dam beyond the limitation specified above and thereafter navigation will be required to pass through the lock and the operation of the lock will be conducted by employees of the Government. * * *

* * * * *

Delay in the construction of the dam resulting from failure of the contractor to complete the essential features of the lock in a manner acceptable to the contracting officer or the refusal of the contracting officer to permit the contractor to proceed with the construction of the dam beyond the limitations specified above because of the unusable condition of the lock will not be considered a cause for delay in the completion of the contract within the meaning of Article 9 of the contract.

* * * * *

The work will be laid out and inspected by an authorized representative of the contracting officer. The inspector so appointed will have the power to reject material or work which, in his opinion, does not conform to the requirements of the specifications. Any rejected material shall be removed from the site and any defective work shall be replaced, unless in each particular case the inspector's action be overruled by the contracting officer. All disputes concerning questions of fact arising under the contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the Secretary of War, whose decision shall be final and conclusive upon all parties thereto as to such questions of fact.

* * * * *

If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions

or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See articles 3 and 15 of the contract.)

*   *   *   *   *

SECTION III. EXCAVATION, FOUNDATIONS, FILL, AND RIPRAP

3–01. *Excavation.*—

(a) *Classification.*—From surveys and borings made at the site it is assumed that conditions will be found approximately as indicated on the drawings, but the Government does not guarantee the nature of the material to be encountered in the river bed, the correctness of depth to rock as assumed or shown on the drawings, the depth to which it may be necessary to excavate or drive piling, or that the bottom or banks of the river will not be changed before or after commencement of work. Samples of borings are on hand at old Lock No. 2, Allegheny River, about 1,700 feet upstream from the site. Bidders are advised to visit the site, to examine these samples, and to judge for themselves the character of the materials to be encountered. Excavation will be classed either as common excavation or rock excavation. Common excavation shall include all materials which may be removed without blasting, by hand, power shovel, clamshell buckets, or dredge. All materials requiring drilling and blasting for their removal shall be classed as rock excavation. * * *

3–02. *Foundations.*—

(a) *Foundations.*—The character and positions of the proposed foundations for the different parts of the work are shown on the drawings. The Government, however, reserves the right to increase the depth, width, or strength of foundations and to eliminate the piling from any portion of the walls if in the opinion of the contracting officer conditions require such modification.

7. Pursuant to the specification set out in the preceding finding with respect to the order of the work, the contracting officer prescribed the order for its execution.

In general terms the work to be carried out consisted of a dam which was to be tied into an abutment in the bank on the north side of the river and connected with a lock on the opposite or south side of the river. In order to build the dam, a cofferdam (referred to as the "dam cofferdam") was

to be built across the river enclosing the area of the location of the dam, and this cofferdam was to be built in three sections, beginning with section 1 on the north side of the river adjacent to the abutment, following with section 2 immediately south thereof, and completing that phase of the work with section 3, immediately south of section 2 and connecting with the river wall of the lock on the south side of the river. In order to build the lock, a cofferdam (herein referred to as the "lock cofferdam") was to be built surrounding the lock area. Pursuant to directions of the contracting officer, the contractor began work in the lock area simultaneously with the work on the abutment and dam on the opposite side of the river and proceeded with construction of the three sections of the dam cofferdam in the order set out above.

CLAIM FOR INCREASED COST DUE TO CAISSON FAILURE

8. One of the items of work required under the contract was the construction of an abutment resting on a concrete foundation. In order to build such a concrete foundation it would have been necessary to build a cofferdam around the foundation area, pump the area dry, and then construct the concrete foundation; the specifications contemplated that method. Instead of constructing the concrete foundation in that manner, however, the contractor requested and was granted permission to construct and use sunken concrete caissons for the abutment foundation. In requesting approval of its plans for that work the contractor on November 19, 1932, submitted detailed drawings of the concrete caissons which it had designed and which it proposed to use. Defendant granted such permission by change order no. 1, dated December 3, 1932, which permitted the construction of two reinforced concrete caissons "as indicated on drawing of this office No. AR2–3C, dated December 1, 1932," and included the following provisions:

(a) The contractor will be held responsible for design, construction, and sinking of caissons. Any caisson which is damaged before landing and seating on bedrock or is otherwise unsuitable for serving its purpose as a foundation for the abutment wall, will be

removed and replaced or repaired to the satisfaction of the contracting officer.

* * * * *

(g) The use of the caisson method will not relieve the contractor of any of the requirements of the specifications.

* * * * *

It is understood and agreed that on account of the foregoing modifications of said contract, additional time will not be allowed.

It is further understood and agreed that all other terms and conditions of said contract shall be and remain the same.

It is estimated that the proposed change will reduce the cost $1,593.50.

9. The plan approved by change order no. 1, all the terms and conditions of which were accepted and agreed to by the contractor, called for the construction and sinking of two caissons which when finally completed would represent two solid masses of concrete adjacent to each other, thus providing a concrete foundation for the abutment. The caissons were designed by the contractor's engineer who was experienced in work of that character, and the design conformed to sound engineering practice. Each caisson was in general outline somewhat like a rectangular box (divided by three 8 x 12 ft. partitions into four sections), 75 feet long, 28 feet wide, and approximately 30 feet high. The sides were of a height necessary to provide a support for the abutment when a satisfactory rock foundation was reached in the bed of the river. It had no bottom when being constructed and the walls tapered down to what is referred to as a cutting edge along its four sides. This cutting edge was 8 inches thick at the bottom and increased in thickness to 4½ feet as it extended upward to the top of the working chamber. The working chamber was 6½ feet in height. The caisson walls were 8 feet thick above the working chamber. Each caisson had four wells, each 8′9″ x 12′. The walls were concrete, heavily reinforced by steel bars, such bars being most numerous in the cutting edge. The caisson was constructed on wood blocking which supported it evenly at all points until the concrete had cured and the forms

had been removed. After completion of the pouring of walls and the curing of the concrete, the next step was to remove the blocking so as to permit the cutting edge of the caisson to rest on the earth at the bottom of the river and excavate the material on the inside and under the cutting edge, whereby the caisson would sink of its own weight. The final step was to fill the working chamber and four wells of the caisson with concrete, thus making a solid concrete block as a support for the abutment.

10. A caisson of the type involved in this suit is designed primarily to act as a column, that is, it is supposed to be supported evenly throughout its footings while it is being sunk, and when the sinking has been completed. The lower part of the caisson rests on a foundation so that a uniform load is obtained throughout the structure. The "column" stresses thus resulting are to be distinguished from those obtained from a "beam" structure, in which the load is concentrated in the middle, such as a table supported at ends by legs and therefore subject to bending stress in the middle. This middle bending stress is called "beam tension." It would be ideal to lower a caisson so that it sinks the same distance on each side and goes down level all the way, thereby avoiding beam tension, but such an ideal sinking is not usually practical or possible. Because of the beam tension which results as the caisson changes its position in sinking, the customary practice in a sinking operation is to remove the blocking in as uniform manner as possible around the perimeter of the caisson, regardless of where the removal is begun, and similarly to excavate equally through the wells and around the interior of the cutting edge in order that there may not be unduly long sections supported by blocking or earth thereby producing greater beam tension than the structure can withstand. One purpose of the reinforcing steel rods in the walls is to take up beam tension which it is expected will arise as the caisson is sunk.

11. During the early part of November 1932, approximately one month before formal approval was given for the use of caissons, the contractor leveled off the river bank at the abutment site where the caissons were to be sunk and

began assembling and building the blocking and forms for their construction, one being referred to as the downstream caisson and the other as the upstream caisson. Operations in connection with the former were carried out ahead of those for the latter. The forms were built so that the cutting edge rested on wood blocking or cribbing to prevent premature sinking. The specifications included the following provisions with respect to the composition and proportioning of concrete, which, by the change order, were made applicable to the caissons:

> *Composition of concrete.*—Concrete shall be composed of cement, fine aggregate and coarse aggregate well mixed and brought to a workable consistency by the addition of water. (See Par. 5–11 (e).)
>
> * * * * *
>
> 5–11. *Proportioning.*—(*a*) *Method:* All classes of concrete shall be proportioned by the water-cement ratio method.
>
> (b) Control: The exact proportions of all materials entering into the concrete shall be determined by the contractor at frequent intervals, as directed by the contracting officer. The contractor shall provide all equipment necessary to determine positively and control the relative amounts of the various materials. The proportions shall be changed whenever the test specimens prescribed in Par. 5–13 (a) indicate the compressive strength of the concrete to be below that specified and when otherwise necessary to obtain the desired density, uniformity and workability, and the contractor will not be compensated because of such changes.
>
> * * * * *
>
> (e) Water content: In calculating the volume of water in any mix, the free moisture contained in the aggregate will be included in the total water content. The total water content per bag of cement for each batch of concrete shall not exceed the following:
>
> Class "A," 5.5 gallons.
> Class "B," 6.5 gallons.
>
> In all cases, however, the amount of water to be used shall be the minimum amount necessary to produce a plastic, workable mixture of the strength specified. In no case shall the slump be less than 2 inches nor more than 7 inches.

An increase in the maximum water content, based only on the requirements of any admixture, will not be permitted unless comparative tests under job conditions show conclusively that the increase in water content does not result in a decrease in concrete strength.

The "slump" of concrete is determined by pouring the concrete into a cone through an opening in the top and then lifting the cone from the concrete. The concrete then spreads and the height is reduced. The reduction in height of 2 inches indicates that the concrete has a 2-inch slump.

Tests were made from time to time, as the work progressed, of the strength of the concrete being used and those tests showed strengths in excess of the minimum requirements. While the contractor furnished all of the labor and material, the defendant's inspectors exercised close supervision over every detail of the pouring operation. The contractor secured the aggregate and the cement from the plant of the Ready Mix Concrete Company in Pittsburgh, a distance of some five miles from the place where the caissons were being built. The cement and aggregate were placed in mixer trucks at the plant just mentioned and hauled to the site, water being added to the mixture in transit so that when the mixer trucks arrived on the job the concrete was ready to be poured. The amount of water used was strictly controlled by the defendant.

12. From the beginning of the pouring operation on the downstream caisson on November 24, 1932, and continuing throughout that operation the contractor's representative insisted that insufficient water was being used in the concrete mixture to make it workable and stated that he would not be responsible for the caisson constructed unless he was permitted to use more water. Defendant's representative refused to permit any change in the water content or otherwise in the mixture. The specifications required that "In no case shall the slump be less than 2 inches nor more than 7 inches." For a part of the time the concrete used met the minimum slump requirement of the specifications but for a part the tests showed a slump even less than the minimum requirement. Defendant's inspector endeavored to maintain a 2-inch slump for strength. Plaintiff did not ask for written in-

structions and made no protest or claim to the contracting officer. Some difficulty was experienced by plaintiff because the mixer trucks arrived at irregular intervals during the early part of the operation which tended to prevent a proper blending of the concrete as poured but this condition existed for only a short time. Because of the dryness of the concrete the contractor experienced difficulty in causing it to be worked so that a proper bond could be obtained with the reinforcing steel bars. This was particularly true in the cutting edge were the reinforcing bars were the closest together. During the first two or three days of the pouring, the contractor worked the concrete by booting and hand methods and before completing the pouring used a vibrator but did not succeed in effecting a satisfactory bonding with the reinforcing rods in all respects. The vibrator was late in arriving and when it was received it did not work satisfactorily for a time.

13. The contractor completed pouring the downstream caisson on November 29, 1932, and removed the outside forms therefrom on December 3, 1932. When these forms were removed a considerable amount of honeycombing was disclosed and since this was a caisson which was built to hold air under pressure, it was necessary to plaster the caisson where the honeycombing appeared. In addition there was some evidence of improper bonding in the cutting edge and in other places. The contractor stated it did not believe it would be able to sink the caisson without damage thereto.

14. The downstream caisson was allowed to cure until December 7, 1932, and on that day the contractor removed the sand and gravel from the working chamber and by 7:45 p. m. also completed the removal of the inside forms. Immediately after removal of the inside forms the contractor began the sinking of the caisson by removing the blocks from the center towards the ends and by excavating through the two center wells. The work of removing the blocking and afterwards the work of excavating in the center was pushed more rapidly than at the ends. As those operations progressed, the caisson proceeded to sink of its own weight. At 10:10 p. m., by which time the caisson had sunk four or five feet, a crack developed beginning in the cutting edge in the second cell of the caisson and extending upward several

feet through one wall towards the top. As the lowering continued until 1:20 a. m. on December 8, 1932, the crack widened and extended upward to such an extent that at that hour defendant's representative ordered operations on the sinking of the caisson discontinued.

Thereafter investigations and discussions took place with respect to the cause of the crack in the caisson in which discussions the contractor's president admitted that a substantial part of the cause was due to improper lowering of the caisson but insisted that a part was due to the dryness of the mixture. Defendant's representative admitted that the dryness of the mixture was a contributing factor in that it made it difficult to work and bond the concrete properly. The break in the caisson was caused by the method and manner in which plaintiff removed the blocking and excavated at the center of the caisson.

15. Efforts were at first made to find some way to make use of the cracked caisson but by December 9, 1932, these efforts were abandoned. Demolition of the broken caisson was begun on the following day and was completed by December 20, 1932. The contractor was permitted to use the broken concrete from the caisson as riprap instead of natural stone as called for by the contract for which the contractor was paid the same price it would have been paid for the stone.

16. As heretofore shown, preparations for the construction of the upstream caisson were being carried out while the downstream caisson was being built. On November 30, 1932, the day following completion of the pouring of the downstream caisson, the contractor began pouring the upstream caisson, using the same mix and under similar conditions as in the case of the downstream caisson, including the securing of the ready-mixed concrete from the same source. This pouring was completed December 2 or 3, 1932. When the forms were removed from the upstream caisson, honeycombing and evidence of lack of bonding similar to that in the case of the downstream caisson were likewise apparent and it was necessary to plaster this caisson before sinking it. However, in view of the experience had with the sinking of the downstream caisson, the contractor exercised

more care in connection with the removal of blocking and in making excavation for the sinking of the upstream caisson which was begun on December 18, 1932, and finally completed about January 22, 1933, in a satisfactory manner after various interruptions.

17. Thereafter the contractor proceeded with the construction of another caisson to take the place of the broken caisson. In constructing the new or rebuilt caisson the same general mix was used, except that the contractor was permitted to use more water and perhaps a small additional amount of cement. In addition, the contractor set up a mixing plant at the site and had its concrete supplied from that source instead of securing ready-mixed concrete from the plant in Pittsburgh as in the case of the original caisson. More care was also exercised in seeing that the material was properly worked. When that caisson was finally finished and the forms removed, little if any honeycombing or improper bonding was apparent. More care was exercised in the removal of blocking and in sinking of the new caisson, and the sinking was satisfactorily completed about April 1, 1933. During the period while the fractured caisson was being demolished and the replacement caisson constructed, the contractor had approximately 75 men engaged in that work and approximately 400 men engaged in other work on the lock and dam.

18. As heretofore shown, the contractor began the sinking of the downstream caisson by removing the blocking from the center toward the ends and at the same time excavating through the two inside or center wells. In proceeding in that manner and pushing the work more rapidly in the center than at the ends, the caisson became in effect a beam with supports at the ends which placed greater weight toward the center than at the ends. Since the beam tension resulting was greater than the structure would withstand, the fracture referred to in finding 14 occurred. A contributing factor was the dryness of the concrete and inadequate working thereof which tended to cause improper bonding of the concrete with the steel rods and thereby weakened the structure. While the walls of the caisson, including the cutting edge, were weakened to some extent

by the character of cement used at the direction of defendant's inspector, the record requires the finding that with proper care the downstream caisson could have been sunk without damage thereto in the same manner that the upstream caisson was sunk which had been built with the same concrete mix and under similar conditions.

19. After demolition of the fractured downstream caisson, the contractor proceeded, at the direction of the defendant, with construction and installation of a caisson to take its place at a total cost of at least $6,013.34, including an amount for job overhead and general overhead so far as satisfactorily established by the record. The contractor proceeded with demolition of the fractured caisson and the construction of the new caisson without written protest and without making claim for additional compensation, and no amount has been paid on account of that work. While some delay in completion of the contract may have resulted from the additional work required on account of the fractured caisson, the record does not satisfactorily establish the extent of that delay nor did the contractor make any claim therefor prior to institution of this suit.

CLAIM FOR INCREASED COSTS OF CONSTRUCTING A THIRD SECTION OF THE DAM COFFERDAM AND FOR REMISSION OF LIQUIDATED DAMAGES

20. As shown in finding 7, pursuant to authority given in the specifications the contracting officer directed the contractor to begin work in the lock area on the south side of the river simultaneously with the work on the abutment on the north side of the river and thereafter to proceed with construction of the dam through the use of a cofferdam in three sections. One requirement of the specifications was that the river should be kept open at all times for navigation. Under the method of procedure adopted, the contractor proceeded with construction of the lock while it was at the same time proceeding with the construction of the abutment and dam but left the third section of the dam open for navigation until the lock was completed. When that point was reached, navigation was sent through the lock

while the third section or final closure of the dam was being effected. The third section of the dam which connected the second section with the lock thus became the final unit to be completed in the operation.

21. Under the progress schedule prepared by the contractor and submitted to defendant October 14, 1932, work on the lock cofferdam was to be commenced on November 14, 1932, and completed on February 13, 1933. However, by reason of starting work some six weeks in advance of receipt of notice to proceed, as shown in finding 3, the contractor began construction on that cofferdam November 10, 1932, and completed it December 8, 1932. It completed pumping the cofferdam on December 14, 1932, and began common excavation therein December 15, 1932. By December 20, 1932, the greater part of the overburden within the lock cofferdam, classified under the contract as common excavation, had been removed and the rock thereunder exposed. On December 20, 1932, the contractor began the rock excavation.

22. In the meantime and beginning as early as October, 1932, the defendant had been taking core borings and making investigations in order to determine the rock conditions at the site of the lock. From the information thus obtained and the conditions revealed when the lock cofferdam was unwatered, the overburden therein removed, and during excavation for the foundations and footings for the lock, it was discovered that the elevation of rock was higher than had been anticipated at the time the specifications and drawings were prepared on which the contractor submitted its bid and the contract was executed, and that the character of the rock was different.

The specifications contained the following provisions with respect to certain of the items involved:

> 1–08. *Quantities.*—The following estimates of quantities for Items 1, 9 and 11 included under these specifications are given only to serve as a basis for comparison of bids. Within the limits of available funds, the United States reserves the right to increase or decrease the quantities as herein estimated by such amounts as will complete the work specified in paragraph 1–02,

hereof, and final payment will not be made until the work is so completed.

Item No.	Designation	Unit	Quantities
1	Concrete, Class B	Cubic yards	50,819
	Common excavation	Cubic yards	35,635
	Rock excavation	Cubic yards	36,948
	Rock channeling	Sq. ft	14,008
	* * *	* * *	* * *

The unit bid prices for the several items mentioned above were as follows:

Concrete, Class B	$6 per cubic yard.
Common excavation	60 cents per cubic yard.
Rock excavation	$1 per cubic yard.
Rock channeling	$1 per square foot.

23. The changed conditions referred to in the preceding finding could not have been fully revealed until after the lock cofferdam was unwatered, the overburden therein removed, and the rock excavation begun. Even with the information then available it was not possible to determine exactly how much rock would have to be removed before a satisfactory foundation could be reached either in the lock chamber or in the land and river walls since the usual situation and requirement in an operation of this kind is to proceed with the excavation until a satisfactory foundation depth is reached. It was revealed, however, during the latter part of December, 1932, and the first half of January, 1933, that since the rock elevation was higher than had been anticipated and the character of the rock different the amount of rock excavation would be increased and the amount of common excavation decreased. While unit prices in the contract provided compensation for the work to be done regardless of whether the estimates shown in the original contract proved correct, or if excavation for foundations had to be extended, the contracting officer realized that under the changed conditions and the necessity of extending the excavation for foundations, greater time would be required to do the work than was originally contemplated. The contracting officer accordingly told the contractor's president that since additional time would be required he

should make application for a change order on account of the additional time required. At that time the contractor was about three weeks ahead of its schedule and was optimistic as to its ability to complete the contract within the contract time, even with the changed conditions revealed in the lock cofferdam, and its president advised defendant's engineer orally that it did not need any additional time on account of the changed conditions. However, the defendant's resident engineer and the contracting officer told plaintiff it was entitled to the additional time and that it was to its interest to accept it. By Jan. 12, 1933, plaintiff had excavated the rock to the elevations originally shown for the foundations and footings, and on the 12th started channeling operations. On January 16, 1933, the contractor made the following request for an extension of time:

> It is now evident that the quantity of rock excavation in New Lock No. 2, Allegheny River, will exceed the original estimate by thirty (30) percent or approximately twelve (12) thousand cubic yards.
>
> You are, of course, acquainted with the reasons necessitating this change and we, therefore, respectfully request that an extension of thirty (30) days be allowed on our contract time to take care of this additional work.

24. Because of additional rock excavation and the changed conditions requiring extension of foundations referred to in the preceding findings and pursuant to the contractor's request of January 16, 1933, change order no. 5 dated January 24, 1933, was issued by the contracting officer and approved by the head of the Department. Prior to its preparation, its terms and conditions had been discussed by the contracting officer with the contractor's president and the latter had indicated his agreement thereto. It read as follows:

"After unwatering the cofferdam and during the excavation of the foundations and footings for the lock it has been discovered that the quantity of common excavation required will be reduced and that the quantity of rock excavation will be increased over that shown on the drawings; consequently, it is necessary in the best interests of the United

States to modify the said contract in certain particulars as follows:

> Rock shall be removed at localities and in quantities as required by the contracting officer or his representative to provide a sound and stable foundation.
>
> Payment for the rock excavated to the grades required by the contracting officer or his representative and payment for common excavation shall be made at the unit prices set forth in the contract for these items.

It is understood and agreed that on account of the foregoing modification of said contract, additional time will be allowed at the rate of one calendar day for each 700 cubic yards of rock removed in excess of 36,948 cubic yards estimated and set forth in paragraph 1-08 of the specifications.

It is further understood and agreed that all other terms and conditions of said contract as modified by Change Orders numbered 1 to 4 inclusive, shall be and remain the same.

The estimated increase in the total contract price due to this change is $6,000.

This change order, being in excess of $500 in amount, does not become effective until approved by the Chief of Engineers.

Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space below."

The change order was accepted and signed by plaintiff's president.

25. At the time the foregoing change order was issued, the contractor had been carrying on its rock excavation since December 20, 1932, and had removed approximately 15,000 cubic yards. It started rock channeling for foundation footings on January 12, 1933. As a result of the work which had been done at the time of issuance of change order no. 5 and investigations which had previously been made, the general character of the rock upon which the foundations were to be built had been discovered which would make it necessary to lower the foundations below the elevation shown in the original plans in order to provide sound and stable foundations for the lock. This matter was discussed by the parties. However, neither the contracting officer nor the contractor

knew then what variations in the quantities would result from the changed conditions. From the information then available it was estimated that approximately 15,000 more cubic yards of rock would have to be excavated than shown on the original plan and that the common excavation to the rock elevation originally shown would be decreased in a similar amount. The extent to which other operations, including additional rock channeling and the placing of additional concrete, would be affected was not then known. However, as heretofore shown, unit prices were provided in the contract for rock excavation, common excavation, rock channeling, and the placing of concrete, and the change order left these unit prices unchanged. Since the estimated increase in rock excavation and the corresponding decrease in common excavation were substantial in amount and since the price for the former was greater—$1 per cubic yard as compared with 60 cents per cubic yard, that is, a difference of 40 cents—it was known at the time the order was issued that the changed conditions would result in a substantial increase in the cost of this work. Based upon the estimated increase of 15,000 cubic yards for the rock excavation with a corresponding decrease in the common excavation to the original elevations shown and by application of the difference of 40 cents in the cost of these two operations, an estimated increase in the total contract price was shown in the change order of $6,000.

The change order, however, did not affect any of the unit contract prices but was prepared solely for the purpose of giving the contractor additional time on account of the changed conditions and additional rock excavation "in quantities as required by the contracting officer to provide a sound and stable foundation." How much additional time would be required was not then known but a basis of measurement of additional time allowable was set up in the change order wherein it was provided that "additional time will be allowed at the rate of one calendar day for each 700 cubic yards of rock removed in excess of 36,948 cubic yards estimated and set forth in paragraph 1–08 of the specifications."

26. The contractor proceeded concurrently with the rock excavation, rock channeling, and the placing of concrete for

the lock cofferdam. All this work was completed on the same day, October 21, 1933. In carrying out the operation, the work done as compared with the quantities for certain items referred to in the specifications and set out in finding 22 was as follows:

Designation	Unit	Estimated quantities	Actual paid quantities
Concrete, Class B	Cubic yards	50, 819	58, 077. 6
Common excavation	Cubic yards	35, 635	12, 713. 37
Rock excavation	Cubic yards	36, 948	58, 230
Rock channeling	Square feet	14, 008	17, 299. 4

All the above work was paid for at the unit prices set out in the contract. In addition similar changes occurred in other items, such as grouting and piping, where extra work and material were required, and these were likewise paid for at the unit prices set out in the contract.

27. The approximate amount of rock excavated at various periods while the contractor was excavating for the lock cofferdam was as follows:

Period	Number of working days	Quantity excavated	Average per day
Dec. 20 to Dec. 31, 1932	11	2, 000	182
Jan. 1 to Feb. 9, 1933	40	26, 000	[1] 650
Feb. 10 to Feb. 28, 1933	19	11, 326	596
Mar. 1 to Apr. 20, 1933 [2]	15	500	33
Apr. 21 to May 4, 1933	11	500	45
May 5 to May 22, 1933 [3]	17	1, 480	87
May 23 to June 9, 1933	18	200	11
June 10 to July 24, 1933	44	2, 548	58
July 25 to Aug. 25, 1933	32	12, 726	400

[1] During the period Jan. 10 to Jan. 20 and the period Jan. 20 to Jan. 30, 1933, an average of approximately 700 yards were removed per day.

[2] Flood prevented excavating for 36 days in this period and the defendant granted an extension of contract time of 30 days on account thereof.

[3] Flood prevented excavating for three days. Defendant granted an extension of contract time of seven days which included this period of delay.

Various conditions accounted for variations in the quantities of rock removed in the different periods. In the early periods from December 20, 1932, to February 28, 1933, the contractor was in general excavating above the plan grade when the work was carried out largely by machines, and a similar situation existed during the period July 25 to August 25, 1933 when rock was being removed which had been left to form a ramp over which rock from other parts of the

excavation would be transported. In most of the other periods where low production was shown, the greater part of the operations was handwork which was necessary by reason of the fact that the foundation grade was being reached and the defendant required the foundations to be carried to varying depths until an acceptable foundation was reached. Some of the rock revealed as the excavation progressed was in thin layers and seamy in character which was unsuitable for a foundation. Defendant's inspectors required the excavation to be continued until a satisfactory rock foundation was reached. In some instances the rock foundations were deepened as much as eight to ten feet below the foundation grade shown in the original plans and specifications. The average depth that the foundation grade was lowered was from two to four feet.

28. At and before the time change order no. 5 was issued on January 24, 1933, both parties were aware of the general character of the rock to be excavated and that it would be necessary to carry the excavation to greater depths than shown in the original plans and specifications in order to provide a sound and stable foundation though neither party knew the exact additional depths which would be required. As shown in the preceding finding, these additional depths were only determined from day to day when the inspectors approved a satisfactory foundation grade. The lowering of the foundation grade required additional channeling, the placing of additional concrete, increased the cost of the operation and required additional time for the work, which factors were either known or within the reasonable contemplation of the parties except as to exact amounts when change order no. 5 was issued. As shown in finding 26, the additional channeling and the placing of additional concrete were paid for at the unit prices set out in the contract but no additional time beyond that provided in the change order was allowed for these operations as separate items. Based upon the unit of measurement set out in change order no. 5 of one calendar day for each 700 cubic yards of rock removed in excess of 36,948 cubic yards set out in the specifications, the contracting officer allowed an extension of time of 30.4 days for the entire additional work

occasioned by the changed conditions encountered which gave rise to the issuance of change order no. 5.

29. June 21, 1933, five months after change order 5, the contractor for the first time made written request for a change order which would provide additional time on account of the additional time required in the placing of concrete by reason of the deepened foundations referred to above, its letter of that date reading as follows:

> Will you kindly arrange for a change order to provide for additional time on account of extra concrete placed by reason of foundations being deeper than plan elevations.

July 10, 1933, defendant's inspector in charge replied to the above request as follows:

> With reference to your letter dated June 21, 1933, requesting that change order be drawn up for the contract at New Lock and Dam No. 2, to provide for additional time on account of extra concrete placed by reason of deeper foundations than shown on the plans, you are advised that Change Order #5, which provides extra time on the basis of increased amount of rock excavation, was drawn up to include all additional time resulting from the increase in rock. Inasmuch as the extra concrete is a direct result of the increase in rock excavation, no further extension of time will be allowed for concrete.

30. January 15, 1934, the contractor renewed its request for additional time on account of extra concrete placed, its letter reading in part as follows:

> Probable delay in the completion of contract for New Lock & Dam No. 2 account reasons beyond contractor's control makes it necessary that we renew our claim for extension of time due to extra quantity of concrete placed over and above plan quantities by reason of foundations being lowered account of soft rock.
>
> We believe our claim to be fair and reasonable for the following reasons:
>
> 1. At the time Change Order No. 5 was prepared we discussed with Lieut. L. D. Clay, then in charge, about additional time for extra concrete and he then ruled that the proper time to make that claim was after the plan quantities were exceeded. We were governed accordingly.

January 18, 1934, the contracting officer replied to that letter in part as follows:

> Receipt is acknowledged of your letter of January 15, 1934, renewing a claim for extension of time for completion of your contract for the construction of New Lock and Dam No. 2, Allegheny River, for the reason that no additional time was specified in Change Order No. 5, dated January 24, 1933, for the placement of additional concrete replacing the rock of unsatisfactory character removed from the foundations of the lock walls.
>
> At the time of negotiating the change order all items of extra work involved in the change were discussed and the measure of extra time to be allowed therefor was agreed to as set forth in the change order, and was accepted by you and cannot be reopened.

The contractor again renewed its request on February 7, 1934, which was denied by the contracting officer on February 8, 1934, with the statement that since no additional data had been presented the original decision was adhered to.

31. The contractor again renewed its requests on March 6, 1934, in a letter which read in part as follows:

> You will note that our letters do not ask for extension of time on account of extra rock excavation, but because extra concrete would be required. It is evident that Change Order No. 5 does not provide for extension of time due to extra concrete as the estimated increase in the total contract price due to this Change Order is only $6,000.00. We estimate the increase in concrete quantity in the Lock will be approximately 7,500 cubic yards or an increase in contract price of approximately $45,000.00, and that we are entitled to an extension of time of one calendar day for each 700 cubic yard increase in the concrete quantity above the original quantity. This would be on the basis of allowing an additional day for the same yardage of concrete as of additional rock removed, which is the manner in which Change Order No. 6, New Lock No. 3, Allegheny River, was executed.
>
> We respectfully request that an additional Change Order be issued to provide additional time to our contract for New Lock and Dam No. 2, Allegheny River, at the rate of one calendar day for each 700 cubic yards of concrete placed in excess of 50,819 cubic yards which

is the original estimated quantity of Class "B" concrete in the Lock.

This request for additional time is made on the basis of increased quantity of concrete in the Lock only and we are not referring, at this time, to any additional time due to increase in quantity of concrete in the Dam and Abutment.

The contracting officer denied that request by a letter dated March 9, 1934, which read as follows:

> Receipt is acknowledged of your letter of March 6, 1934, entering a protest to my decision as expressed in my letters of January 18, 1934 and February 8, 1934 with respect to an extension of time in connection with Change Order No. 5 on your contract for the construction of New Lock and Dam No. 2, Allegheny River.
>
> Your attention is invited to Article 3 of your contract which states "Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof."
>
> Change Order No. 5 is dated January 24, 1933, was acknowledged by you, and was approved by the Chief of Engineers February 7, 1933. Your letter to Lt. C. W. Ott, referred to in your letter of March 6, 1934, was dated June 21, 1933, a matter of four months after approval of the change.
>
> I reiterate that no additional data has been presented by you and my decisions as expressed are adhered to.

32. June 18, 1934, the contractor appealed to the Chief of Engineers, War Department, from the foregoing decisions of the contracting officer but the record does not show any action on that appeal. However, the additional time requested was not granted by defendant.

33. Under the contractor's progress schedule, the lock concrete was to be completed July 24, 1933, whereas it was actually completed October 21, 1933, that is, 89 days later, and under the same schedule the lock was to be completed October 25, 1933, whereas it was actually completed January 21, 1934, that is, 88 days later.

The following extensions of time were granted by the contracting officer on account of events which occurred prior to January 21, 1934, the date the lock was completed:

	Date	Cause	
Change Order No. 2	Dec. 5, 1932	Change in Specs.	30 days
Change Order No. 5	Jan. 24, 1933	" " "	30.4 "
Contracting Officer's letter	Apr. 18, 1933	Weather	30 "
" " "	May 19, 1933	"	7 "
" " "	Aug. 31, 1933	Strike	2.5 "
" " "	Jan. 22, 1934	Weather	5 "
			104.9 days

After allowing for the above extensions, the contractor was about three weeks ahead of its schedule as extended when the lock was completed on January 21, 1934.

34. While the contractor was proceeding with the work on the lock, referred to in the preceding findings, it was also going forward with construction of the dam, such latter work being carried out by building the cofferdam for the dam in three sections. Under the contract and procedure directed by the contracting officer, the third and last section of this cofferdam could not be built until the lock was ready for navigation. Under its progress schedule the contractor contemplated beginning work on the third section of this cofferdam October 2, and completing it October 30, 1933, that is, a period of 28 days.

Since, as heretofore shown, the lock was not completed until January 21, 1934, the contractor was unable to begin work on the third section of the dam cofferdam, except for a small amount of preliminary work done in the fall of 1933, until January 11, 1934, which resulted in the work being done in the winter months when conditions were more unfavorable for work of that character than during October 1933 as originally contemplated, and made the cost greater. The reason for the lock work being carried out later than originally planned has been explained in the preceding findings, wherein it is shown that extensions of contract time had been granted on account of events which had occurred prior to completion of the lock which, when used as a modification of the original progress schedule, would show Febru-

ary 2, 1934, as the date for beginning the work on the third section of the dam cofferdam and March 2, 1934, as the completion date.

35. The contractor began the principal work on the third section of the dam cofferdam January 11, 1934, some three weeks in advance of the beginning date as modified by the extensions granted by the defendant and by February 5, 1934, had accomplished a substantial portion of the work. The contractor completed this work April 28, 1934, 108 days after January 11, 1934. During that period the contractor was granted extensions of time on account of inclement weather, ice, and floods in the total amount of 29 days which, when deducted from the total elapsed time of 108 days from the beginning of the work until its completion, leaves a balance of 79 days actually consumed in carrying out this work instead of 28 days as originally contemplated by the contractor. The pool level of the Allegheny River was no higher from January 11, 1934, when the contractor began this work, to March 2, 1934, when higher stages of the river began, than it was during October 1933 when the contractor originally contemplated doing this work. While the weather was more unfavorable for work of this character during the period from January 11 to March 2, 1934, than it was during October 1933 and therefore accounts to some extent for a longer period being required than originally contemplated, the principal reason for the longer period required to do the work and greater expense incurred was the difficulty experienced by the contractor in effecting a final closure of the third section of the dam cofferdam. The contractor did not use the best method of effecting the closure. The responsibility for such work was entirely that of the contractor.

36. As heretofore shown, the second section of the dam cofferdam had been completed prior to the building of the third section. The length and height of the third section were slightly greater than corresponding dimensions of the second section though these differences in dimensions contributed only to a minor extent in the difference in cost of the two sections.

The second section was built in part on dry land and in part in water from two to four feet deep where the current

was not swift, whereas the third section was built entirely in deeper water and since it was the closure section the current was much more swift than where the second section was built. Because of water conditions encountered in a stream of the character where this dam was built, the closing section of the cofferdam was more difficult and more expensive to construct than the second section. While the record is not entirely satisfactory as affording a comparison for comparable items entering into the two sections, it is sufficient to show a cost of comparable items for the second section of $10,194.71 as compared with at least $22,450.07 for the third section, though it is not sufficient to show that this greater cost of $12,255.36 was attributable to acts of the defendant. No written protest was filed or claim made on account of this increased cost either by the contractor or plaintiff prior to institution of this suit.

Such increased costs as were incurred and such additional time as may have been necessary in the construction of the third section of the cofferdam were not due to any fault of defendant or any action by it that would constitute a breach of the contract.

37. July 11, 1934, J. C. Shriber and F. C. Schroeder were duly appointed receivers of the contractor (The Vang Construction Company) by decree of the District Court of the United States for the Western District of Pennsylvania and qualified to act in that capacity. Pursuant to the authority vested in them by that decree, the receivers on July 13, 1934, elected to disaffirm and refused to accept the contract involved in this suit. Thereupon the plaintiff surety company and the defendant entered into a supplemental contract dated July 13, 1934, wherein plaintiff agreed to complete the contract in accordance with all its terms and conditions. Immediately after execution of the supplemental contract plaintiff proceeded with the work, using substantially the same organization as had been used by the contractor, and completed same October 27, 1934.

In completing the work plaintiff expended $138,301.38 and, in addition, paid claims of $156,145.56 for labor and material which had been furnished to the contractor. Plain-

tiff's total receipts from defendant and the contractor amounted to $265,068.76, that is, an amount of $29,378.18 less than the amount expended by plaintiff.

38. The time for completion of the work as specified in the contract was 450 days. The contracting officer granted extensions of time which extended the period for carrying out the work 635.5 days. The time required for performance of the work was 689 days, that is, 53.5 days longer than the time allowed by the contracting officer. The contracting officer assessed liquidated damages of $300 a day in the total amount of $16,042.92 on account of the excess time required for completion of the contract. The following tabulation shows the various extensions of time which were granted, the reasons therefor, as well as the periods for which allowed and the manner in which the liquidated damages were computed:

		Period	*Calendar Days*
Contract Period		12/7/32–3/1/34	450
(a) Extensions of time under Change Order Agreements:			
# 2—Change in Specifications			30
# 5—Change in Specifications			30.4029
#13—Change in Specifications			49.6207
As Adjusted		12/7/32–6/19/34	560.0236
(b) Extensions of Time for Unforeseeable Conditions, Weather, Floods, Ice, Strike, etc.:			
Engineer's Letter:			
4/18/33	Weather	3/13/33–4/12/33	30
5/19/33	Weather	5/10/33–5/16/33	7
8/3/33	Strike	8/23/33–8/25/33	2.5
1/22/34	Weather and River	1/1/34–1/5/34	5
3/2/34	Flood damage to Cofferdam	2/3/34–2/7/34	5
2/21/34	Weather	2/9/34–2/10/34	2
3/22/34	Weather and Ice	3/3/34–3/13/34	11
4/7/34	Weather	3/29/34–	1

	Period	Calendar Days
(b) Extension of Time for Unforseeable Conditions, Weather, Floods, Ice. Strike, Etc.—Con.		
Engineer's Letter—Con.		
5/ 1/34 Weather and Flood	4/ 4/34– 4/18/34 (Partially)	10
10/ 8/34 Weather and Flood	9/30/34–10/ 2/34	2
Total Allowance for Unforeseeable conditions		75.5
Grand Total Allowed	12/ 7/32– 9/ 3/34	635.5236
Actual Performance	12/ 7/32–10/27/34	689
Liquidated Damages @ $300 ($16,042.92) for		53.4764 Days.

39. Plaintiff in signing the final voucher placed thereon a reservation that it was being signed "without prejudice to claims for remission of liquidated damages * * *." Upon receipt of final payment, plaintiff advised defendant in part as follows:

> This check is accepted under protest and without prejudice to the right of the contractor or its surety to petition for a review and reconsideration of the claim for remission of all liquidated damages amounting to $39,600.
>
> * * * * *
>
> This check is accepted under protest and with the distinct understanding that the contractor and its surety expressly reserve the right to claim, by suit or otherwise, other and additional moneys which are claimed to be due and payable by the United States on account of this contract and in payment of damages sustained by the contractor in the performance thereof, all of which were occasioned by the fault and neglect of the United States of America.

40. November 4, 1936, the receivership proceedings against the contractor were terminated and by appropriate decree the receivers were discharged, having previously distributed

and returned to the contractor all the assets remaining in their hands as shown by their first and final account.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The Vang Construction Company, herein referred to as the contractor, entered into a unit-price contract with defendant dated November 9, 1932, for the construction of a lock and dam across the Allegheny River about five miles from Pittsburgh, Pennsylvania. Eight items involving a powerhouse, lock machinery, and other machinery and equipment were lump-sum items. All others were unit-price items. The estimated contract price based on these lump-sum items and other estimated quantities for the unit-price items was $1,190,251.48. The contractor's bid, which was accepted, was submitted October 14, and prior to October 24, 1932, it was advised by defendant that the contract had been awarded to it. The contractor, with the consent of defendant, began construction operations under the specifications and drawings October 24, 1932, and, subsequent to November 9, signed the formal contract and furnished a performance bond on which plaintiff was surety. The contract was signed and the bond approved by defendant December 6, and the contractor received formal notice to proceed on the following day, December 7, 1932. This fixed the completion date, for a period of 450 days, as March 1st, 1934.

While the contractor was continuing with the work a receivership proceeding was filed against it July 11, 1934, and, on the same date, the U. S. District Court for the Western District of Pennsylvania appointed receivers for the contractor. Under authority given by this decree the receivers on July 13 elected to disaffirm the contract between The Vang Construction Company and the defendant and notified the contracting officer of their refusal to accept the contract and proceed with its completion. Thereupon, and on the same day, the plaintiff, as surety on the contractor's performance bond, entered into a supplemental contract with the Govern-

ment and the receivers of The Vang Construction Company, which contract provided that the surety would take over and complete the work under and in accordance with the original contract, receive semi-monthly payments from the Government for all earned estimates for work performed by it under the original contract, and "that in the event the Fidelity and Deposit Company of Maryland sustains a loss in the completion of the work it shall receive payment to the extent thereof from any amounts earned by The Vang Construction Company not heretofore paid to the contractor, if any, after all claims of the United States against the contractor have been satisfied."

In completing the contract work plaintiff used substantially the contractor's organization, including its employees and laborers, and expended $138,301.38 for such completion. In addition plaintiff paid $156,145.56 for material and labor claims against the contractor which had accrued at the time of appointment of the receivers. These two amounts total $294,446.94.

During and upon completion plaintiff received from the Government progress payments for contract work performed by it in amounts totaling $78,270.96. This amount included $15,114.72 allowed but not paid to the contractor on progress estimate no. 23. On the final payment voucher plaintiff also received $88,671.80 representing the total of the retained percentages due after deduction by defendant of $16,042.92 for liquidated damages for 53.5 days' delay. The total of the amount so paid to plaintiff by defendant was $166,942.67. The sum of $50,000 of the retained percentage of $88,671.80 above-mentioned represents amounts withheld by defendant from prior progress payments earned by and paid to the contractor. In addition to the amount of $166,942.67 received from the Government upon completion of work, plaintiff also received from the contractor $98,216. The total of the amounts which plaintiff received from the Government and the contractor was $265,068.76, and inasmuch as plaintiff had paid out for completion of the contract work and on material and labor claims against the contractor a total of $294,446.94, its loss was $29,378.18. The total paid plaintiff

by defendant under the terms of the original contract and the supplemental agreement of July 13, 1934, was $28,641.29 in excess of the amount expended by plaintiff in completing the work. However, under the terms of the performance bond and the supplemental agreement of July 13, to which the receivers were also parties, plaintiff upon completion of the work in October 1934 became subrogated to all rights of the contractor and the receivers under the original contract. The supplemental agreement did not amount to an assignment by the receivers of a claim against the Government within the meaning of sec. 3477 of the Revised Statutes, and on November 4, 1936, prior to institution of this suit, the receivers, with approval of the court, distributed and returned to The Vang Construction Company all assets of every kind then remaining in their hands, and they were discharged. This action of the receivers included the return to the contractor of any claim which they, as receivers for the company, or the contractor may have had against the United States under the contract of November 9, 1932.

The first item of the claim is $8,143.88 for alleged excess cost of reconstructing the first of two concrete caissons which the contractor, with the consent of defendant, elected to use as the foundation for the abutment of the dam. The reconstruction cost was $6,013.34 (finding 19). The proof does not show that rebuilding of this caisson delayed the final completion of the contract work.

The specifications and original plans required the contractor to build a cofferdam around the area of the foundation for the abutment and, after pumping the area dry, to construct the concrete foundation. However the contractor proposed the caisson method and asked permission to use it. This permission was granted by change order no. 1 which authorized the contractor at its own expense and risk (finding 8) to use two caissons, each 75 feet long, 28 feet wide, and 30 feet high, with walls and three partitions 8 feet thick above the working chamber. The change order specifically provided that the contractor would be responsible for the construction and the sinking of the caissons and that "any

caisson which is damaged before landing and seating on bed rock, or is otherwise unsuitable for serving its purpose as a foundation for the abutment wall, will be removed and replaced or repaired to the satisfaction of the contracting officer." The provisions of the specifications relating to concrete were made applicable to the caissons (finding 11). The work of constructing the two caissons, known as the downstream and upsteam caissons, proceeded simultaneously, but operations on the first, or downstream, caisson were carried on ahead of those for the other one: the two caissons were built adjacent to each other. The pouring of concrete for the downstream caisson was commenced November 24 and was completed November 29, 1932; and that for the upstream caisson was commenced November 30 and was completed December 2, 1932. The same concrete mix was used in both caissons and such concrete was poured under the same conditions and the same instructions of defendant's inspector. The forms were removed from the first caisson December 3, 1932, and it was allowed to cure until December 7 when the work of removing blocking, or cribbing, and excavating for the sinking of this caisson was commenced. Two hours and twenty minutes after this work was commenced one wall of the caisson cracked from the bottom upward near its center, and as the work of removing, blocking and excavating continued the crack widened and extended upward to such extent that defendant's inspector condemned the caisson and ordered its demolition and reconstruction. The contractor demolished and reconstructed the caisson without protest or claim to the contracting officer.

It is now claimed on behalf of the contractor that the breaking of the caisson was caused by the unauthorized and arbitrary action of defendant's inspector in requiring the contractor to use unworkable concrete that was too dry to permit it to bond properly with reinforcing rods in the cutting edge and walls of the caisson, but this claim is not sustained by the evidence. The inspector's actions and instructions were taken and given in an honest effort to exact

compliance with the specifications so as to provide concrete of the required strength. He did not act arbitrarily, and the instructions given by him did not violate the specifications. The mix to be used in the concrete was fixed by the specifications (finding 11) and, prior to pouring, defendant's inspector made tests of the concrete for the purpose of ascertaining that it had at least the minimum strength required by the specifications. All concrete that went into the caissons was actually stronger than the minimum requirements. Although the contractor protested to the inspector from the beginning of the pouring of the first caisson that insufficient water was being used in the concrete mix to make it workable, the proof fails to establish that the concrete was unworkable within the meaning of the specifications. So far as the concrete was concerned, the contractor's difficulty was due to the fact that the concrete was hauled about five miles and was not properly and thoroughly worked and tamped as it was poured. Par. 5–11 of the specifications provided that "An increase in the maximum water content, based only on the requirements of any admixture, will not be permitted unless comparative tests under job conditions show conclusively that the increase in water content does not result in a decrease in concrete strength." Moreover, by failing to protest to the contracting officer, as required in such cases by pars. 1–22 and 1–25 of the specifications, the contractor accepted the instructions and rulings of the inspector and cannot now complain. The purpose of those provisions was to place upon the contractor the responsibility of bringing before the contracting officer for appropriate action any instruction or ruling of the inspector which the contractor might think erroneous in order that the contractor, as well as the Government, might not be put to unnecessary expense.

If it be assumed, however, that the inspector in his instructions exceeded his authority under the specification provisions relating to concrete and that plaintiff is not barred by its failure to protest to the contracting officer, the contractor still cannot recover on this claim for the reason that the far greater weight of evidence shows that the break in the caisson was due not to the weakness of the concrete but to the manner

in which the contractor removed the blocking from under the caisson and made excess excavation in the center portion thereof, thereby leaving the center portion of the sidewalls of the caisson without adequate support. The second caisson was exactly like the first. The same concrete mix was used and poured under similar conditions. However, the contractor used more care in properly sinking this caisson and no trouble was experienced with it.

The second item of the claim is $26,146.32 for alleged loss of profit and excess cost of constructing the third section of the cofferdam for the final section of the dam across the river where it joined the navigation lock. The contract required the concrete navigation lock and all of its machinery and equipment to be completed and opened for the flow of water and for navigation purposes before the cofferdam for the final section of the dam was constructed. The claim is based on alleged excess cost of the third section of the cofferdam over the cost of the adjoining second section previously constructed. The proof does not show that such excess cost was more than $12,255.36 (finding 36).

The basis of this claim is that defendant by misrepresentations in the specifications and drawings as to subsurface conditions at the lock site delayed the contractor in completion of the lock, thereby throwing the work of constructing the third cofferdam section into winter weather and a period of high water which rendered such construction more difficult and expensive than the contractor had anticipated, or was required to expect.

The proof conclusively shows that defendant made no such misrepresentation as to subsurface conditions at the lock site as would render it liable for damages as for a breach of contract for any additional time required on account of the subsurface conditions actually encountered. This was a unit-price contract as to all excavation and concrete work that might be necessary or required. The contractor was given extensions of time for all extra work due to changes, unforeseen conditions, and various other causes, and was paid the contract unit prices for all work performed. Rock was encountered by the contractor above the rock elevation indi-

cated on the original drawing and when the elevation for the foundation as originally shown was reached on January 12, 1933, it was determined that excavation would have to be extended due to unstable conditions of the rock at that elevation. Par. 3–01 of the specification provided under the heading "Excavation, Foundations," that "From surveys and borings made at the site it is assumed that conditions will be approximately as indicated on the drawings, but the Government does not guarantee the nature of the material to be encountered in the river-bed, the correctness of depth to rock as assumed or shown on the drawings, or the depth to which it may be necessary to excavate * * *. Bidders are advised to visit the site, to examine the samples, and to judge for themselves the character of the materials to be encountered." Par. 3–02 provided that "The character and positions of the proposed foundations for the different parts of the work are shown on the drawings. The Government, however, reserves the right to increase the depth, width, or strength of foundation * * * if in the opinion of the contracting officer, conditions require such modification."

The contracting officer gave the contractor an extension of time of 30.4 days in accordance with change order no. 5 (finding 24) for all work connected with or incidental to additional rock excavation, including such excavation and other work as made necessary by reason of the extension of foundations, all of which work was included in the terms of the change order and the formula set forth therein for determining additional time to be allowed. The proof does not show that this extension of time was inadequate to cover the time needed and used for the additional work covered thereby. Moreover, when the contractor protested June 18, 1933 that change order no. 5 of January 24 did not include such time as might be necessary in connection with concreting operations for the extended foundation and the contracting officer held that the formula set forth in the change order did include such work, the contractor did not appeal to the head of the department until six months after the contracting officer first denied its claim for additional time.

The correctness of the decision of the contracting officer allowing this extension of 30.4 days is shown by the following facts: On January 12, 1933 the contractor had excavated all rock to the levels shown for the foundations and had commenced channeling for footings, etc. Because it had originally commenced construction operations ahead of its progress schedule, which it was required to file with its bid, the contractor was three weeks ahead of schedule on January 12, 1933. On account of events not related to the work incident to additional rock excavation and extension of foundation, which occurred prior to January 21, 1934 when the lock was completed, the contractor received various extensions of time which, with the 30.4 days granted under change order 5, amounted to 104.9 days (finding 33). After allowing for these extensions the contractor, on January 21, 1934, when it completed the lock, was still ahead of its schedule approximately three weeks.

For the reasons stated we hold that defendant did not breach its contract in relation to the navigation lock structure by preventing the contractor from completing the same by October 25, 1933, as it claims. It follows, therefore, that defendant is not liable for any excess costs that may have been sustained by the contractor or plaintiff in construction of the third and final section of the cofferdam for the river dam.

The last item of the claim is for $16,042.92, liquidated damages charged and deducted by defendant for 53.5 days' delay. The proof does not establish that defendant was responsible for this delay in completion of the entire work by the contractor and plaintiff. No protest or appeal was taken, as required.

Plaintiff is not entitled to recover and its petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge*, and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

EARL S. WORSHAM, TRADING AS WORSHAM BROTHERS v. THE UNITED STATES

[No. 44070. Decided April 2, 1945. Plaintiff's motion for new trial overruled June 4, 1945.]*

On the Proofs

Government contract; certificate of Government agent not supported by the evidence is not binding on the Court of Claims.—Where a certificate, signed and sworn to by the District Manager of the United States Employment Service, that contractor on a Government project was delayed by reason of inability to obtain qualified labor through the Employment Service was accepted by the Government's representative as the basis for an order granting an extension of time; and where it is shown by the evidence adduced that the District Manager's sworn statement was a piece of manufactured evidence, that it was misleading and did not state the facts; it is *held* that the findings of fact in the order extending the time is not conclusive and binding on the Court of Claims in a suit by the contractor to recover damages for the delay.

Same; evidence shows that contractor was not delayed by inability to secure labor through U. S. Employment Service.—Where in the specifications of a Government contract it was provided that contractor should obtain qualified labor through an employment agency approved by the United States Employment Service; it is *held* that on the proof presented the Government not only furnished the contractor sufficient qualified labor but furnished him more labor than he could use, and plaintiff is not entitled to recover damages for delay on account of the Government's failure to supply labor.

Same; requirement of defendant's representative that salt-glazed tile be installed on wall and partition bases was correct.—Where under a contract for the construction of barracks all walls and partitions, with certain exceptions, were to be constructed of building tile or to be plastered in lieu of the construction specified, which was salt-glazed tile to the full height of the walls and partitions; and where plaintiff elected to plaster the walls, for which a deduction was made; it is *held* that the requirement by the defendant's representative that salt-glazed tile should be installed at the wall bases, where salt-glazed tile was plainly indicated on the plans, was correct and plaintiff is not entitled to recover as for extra work.

*Plaintiff's petition for writ of certiorari denied.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a citizen of the United States engaged in the business of general contracting under the trade name of Worsham Brothers, with his principal office at Knoxville, Tennessee.

2. On November 23, 1935, the plaintiff entered into a contract with the defendant to furnish all labor and materials and to perform all work required for the construction of barracks at Fort McClellan, Alabama, for the consideration of $320,500. The work was to be commenced on or before December 3, 1935, and was to be completed on or before July 30, 1936.

3. Paragraph S–C 3 of the specifications reads as follows:

> *Employment of union labor.*—The following, which is hereby made a part of these specifications, is quoted from Administrative Order #15 of the Works Progress Administration, dated August 15, 1935:
>
> > "All organized labor, skilled and unskilled, when organized labor is desired and requested by the contractor, which is employed upon projects prosecuted under contract shall be supplied by the employment agencies designated by the United States Employment Service, from the membership of recognized unions, with preference, first to those members of such unions who constitute regular employees of the contractor and who are on the local public relief rolls, second, to other members of such unions who are on the relief rolls, and upon the exhaustion of union members on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment

> agency has notified the unions of the receipt of such request, such labor may be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service."

Plaintiff desired to use organized labor and so notified the United States Employment Service.

4. On January 9, 1936, plaintiff wrote his superintendent at Anniston, Alabama, a letter which reads in part as follows:

> Do not fail to begin to ask for extension of time on everything you have an excuse for and do not wait until later on in the job. Get on the good side of Ebeling so he will grant us all the extensions we may need.

Later, on March 18, 1936, plaintiff wrote his superintendent another letter, which reads in part as follows:

> One thing we must do is to get requisitions in, in writing, and to keep asking for extension of time. Set out in your letters that our overhead is tremendous due to their not furnishing sufficient numbers of workmen and write them a letter every few days. DO NOT FAIL TO DO THIS [sic]. We have gone on record from this office stating that we are going to enter a claim for this overhead but, confidentially, we do not believe the Government will allow us anything for any claim we may set up for this. However, if you keep your files built up properly, then we have a better chance. It will also help in getting the extension of time.

Other similar letters were written from time to time.

Plaintiff made a number of requests for extensions of time on account of the alleged failure of the United States Employment Service to furnish him a sufficient supply of qualified labor. In response thereto the constructing quartermaster wrote the Quartermaster General in Washington, on July 15, 1936, enclosing plaintiff's requests, and recommending the extension requested of 120 days. In reply, on July 21, 1936, the office of the Quartermaster General wrote the constructing quartermaster a letter, which reads in part as follows:

> In the event that qualified workers other than members of organized labor were not available during the period of the need for such workers, the request of the contrac-

tor should be supported by a certificate from the Employment Agency designated by the United States Employment Service to the effect that qualified non-union labor was not available.

Two days after the date of this letter plaintiff's superintendent secured from the District Manager of the United States Employment Service at Anniston, Alabama, an original and a copy of a letter, both of which were sworn to, which read as follows:

> I hereby certify that qualified skilled labor was not available in sufficient numbers to fill the requisitions presented by Worsham Brothers, contractor for the construction of one Barracks Building at Fort McClellan, Alabama.
>
> Although this office made every endeavor to furnish qualified workers to this contractor, unnecessary delays were caused in furnishing many qualified workers because they were not available at the time requisitions were received from the contractor.
>
> In many instances, qualified workers requested did not report to the contractor within a reasonable length of time. The time that elapsed from receipt of requisitions until men reported was excessive.
>
> Yours very truly,
>
> H. S. KENT
> *District Manager*

This letter had been originally drafted by plaintiff's superintendent and was copied by the District Manager of the Employment Service on the stationery of that service. The copy was sent to plaintiff in a letter from his superintendent, which reads in part as follows:

> After talking with Spear and explaining the situation to him, he agreed to leave it up to Kent. After chewing the rag awhile I finally got Kent to agree to it and I took him to town and a Notary Public and got it fixed up. I am enclosing a copy of the affidavit.
>
> It occurs to me that these affidavits or affidavit affords us valuable evidence should you elect to claim for damages against the Government. That is why I made the copy before turning the original over to the Major (the Constructing Quartermaster). Our claim for damages or additional cost caused by the labor situation can well be substantiated by the affidavit, which clearly states that we are unable to procure men as and when needed.

On July 24, 1936, the constructing quartermaster forwarded to the Quartermaster General an order extending the time for the completion of the job. This was signed by Lt. Col. H. E. Pitz, Acting Chief, Construction Division, and was returned to the constructing quartermaster, who delivered it to plaintiff on August 9, 1936. This letter, extending the time for completion, reads as follows:

> With reference to your letter of July 11, 1936, requesting an extension of time for performance of your contract * * * due to insufficient supply of qualified labor available through the source of procurement stipulated in said contract, you are advised that an investigation by this office has disclosed that work on the project as a whole was delayed one hundred and twenty days as a result thereof.
>
> Under the provisions of Article 9 the completion time of Contract No. W 6119 qm-54 is hereby extended one hundred and twenty days beyond the completion date stipulated therein.

However, as a matter of fact, there was never a shortage in the supply of qualified labor; but, on the contrary, more than a sufficient supply was promptly sent to the job by the United States Employment Service. Plaintiff in fact was not able to hire a large number of men which he had requisitioned and which had been sent to the job by the United States Employment Service. Plaintiff suffered no delay on account of a labor shortage.

5. By reason of the contracting officer's extension of time by 120 days the completion date of the contract was changed from July 30, 1936, to November 27, 1936.

During the course of the contract work the contracting officer also issued to the plaintiff an order dated November 13, 1936, for certain changes in the work and in the order extended the time for completion of the contract by 90 days from November 27, 1936, to February 25, 1937.

On April 8, 1937, the contracting officer further extended the contract time by 41 days to cover delay "due to strikes and floods causing delays in deliveries of kitchen and plumbing equipment."

This brought the completion date to April 7, 1937, on which date the defendant accepted the project as completed.

6. The contract contained the following item:

Item VI.—All walls and partitions (except in Kitchens, Pantries, Dishwashing Rooms, Toilets, Showers and Washrooms, Units A, B, and C, and Preparation Room-Unit A, which will remain Salt-Glazed Tile full height) to be constructed of Building Tile and to be Plastered in lieu of construction specified_______________ Deduct $10,000.00

The reference "construction specified" was to salt-glazed tile full height of walls and partitions, as specified in the advertisement and bid unless Item VI was adopted by agreement in lieu of such construction. Item VI was adopted by agreement in lieu of such construction and was specified in the contract, and the plaintiff contended that this called for a plastered wall from floor to ceiling, without the use of salt-glazed tile base at the floor level. The constructing quartermaster required plaintiff to install salt-glazed tile at the base and plaster above the base to the ceiling. Plaintiff protested against this requirement and the constructing quartermaster replied to this protest March 10, 1936, as follows:

> With reference to your letter of March 5, 1936, wish to call your attention to ¾″ scale, Typical Wall Section showing plaster as an alternate, on Plan No. 6119–715.
>
> It will be noted that tile base is to be used where walls are plastered.
>
> The alternate item in the bid sheet, calling for the omission of certain tile walls, did not include the base because wall and base are two separate and distinct items.

7. From the foregoing decision plaintiff appealed to the Quartermaster General. The decision of the Quartermaster General was conveyed to the plaintiff in a letter dated July 9, 1936, from the Constructing Quartermaster, the third paragraph of which reads as follows:

> With reference to salt-glazed tile, as the alternate typical wall section shown on contract drawing No. 6119–715 clearly shows tile base in all cases of tile or plaster wall finish, the installation of this tile base will

be insisted upon and must be installed by the contractor as a part of his contract.

Plan No. 6119–715 referred to in this and the preceding finding is defendant's Exhibit 3, and shows that a salt-glazed tile base is required with a plaster wall finish.

Plaintiff installed the salt-glazed tile base as directed.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On November 23, 1935, plaintiff entered into a contract with the defendant for the construction of Army barracks at Fort McClellan, Alabama. The contract provided for the completion of the work by July 30, 1936, but on account of certain delays it was not in fact completed until April 7, 1937. There were extensions of time granted, however, which covered the delay in completion, and no liquidated damages were assessed.

Plaintiff sues, first, for damages resulting from defendant's alleged failure to furnish sufficient qualified labor and, second, for the extra cost of the use of salt-glazed tile on wall and partition bases.

It is alleged that special condition 3 of the specifications required defendant to furnish sufficient qualified labor for the plaintiff to perform his contract without delay, and that by the failure to do this defendant breached its contract. This condition reads:

> *Employment of union labor.*—The following, which is hereby made a part of these specifications, is quoted from Administrative Order #15 of the Works Progress Administration, dated August 15, 1935.
>
> > "All organized labor, skilled and unskilled, when organized labor is desired and requested by the contractor, which is employed upon projects prosecuted under contract shall be supplied by the employment agencies designated by the United States Employment Service, from the membership of recognized unions, with preference, first, to those members of such unions who constitute regular employees of the contractor and who are on the local public relief rolls, second, to other members of such unions who

are on the relief rolls, and upon the exhaustion of union members on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment agency has notified the unions of the receipt of such request, such labor may be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment service."

Whether or not this provision obligated the defendant to furnish a sufficient quantity of qualified labor, plaintiff, of course, is not entitled to recover if defendant in fact furnished sufficient qualified labor. Plaintiff says that it did not, and relies in support of this assertion on the extension of 120 days granted by the contracting officer to cover delays "due to insufficient supply of qualified labor available through the source of procurement stipulated in said contract." This extension order, signed by H. E. Pitz, Lt. Col. Q. M. C., Acting Chief, Construction Division, and dated July 24, 1936, reads as follows:

> With reference to your letter of July 11, 1936, requesting an extension of time for performance of your contract * * * due to insufficient supply of qualified labor available through the source of procurement stipulated in said contract, you are advised that an investigation by this office has disclosed that work on the project as a whole was delayed one hundred and twenty days as a result thereof.
>
> Under the provisions of Article 9 the completion time of Contract No. W 6119 qm–54 is hereby extended one hundred and twenty days beyond the completion date stipulated therein.

Colonel Pitz, however, testified that he had no knowledge of the facts, but relied upon the statements and recommendations of his subordinates and that "normally the recommendation of the constructing quartermaster is the controlling factor in the case."

On July 15, 1936, the constructing quartermaster wrote the Quartermaster General in Washington enclosing nine letters

from plaintiff requesting extension of time on account of delays due to a shortage of labor. He called attention to plaintiff's letter of July 11, 1936, requesting an extension of 120 days on this account. With reference to these requests the constructing quartermaster says:

> Realizing that the contractor was delayed on this account, this office recommends that an extension of 120 days be granted and the enclosed extension order be approved.

In reply the office of the Quartermaster General wrote the constructing quartermaster calling attention to the labor provision of the contract set out above, and stating:

> In the event that qualified workers other than members of organized labor were not available during the period of the need for such workers, the request of the contractor should be supported by a certificate from the Employment Agency designated by the United States Employment Service to the effect that qualified non-union labor was not available.

Two days after the date of this letter, M. C. Wright, plaintiff's superintendent, approached H. S. Kent, District Manager of the United States Employment Service at Anniston, Alabama, and presented to him a letter which had been drafted by Wright and asked Kent to copy the letter on the stationery of the United States Employment Service and sign it and swear to it. Kent agreed. The letter was copied on the stationery of the Employment Service, and was not only signed by Kent, but was sworn to by him before a Notary Public. The original and a copy of the letter were delivered to M. C. Wright. The copy was also sworn to. Wright took the original and delivered it to the constructing quartermaster. It read as follows:

> I hereby certify that qualified skilled labor was not available in sufficient numbers to fill the requisitions presented by Worsham Brothers, contractor for the construction of one Barracks Building at Fort McClellan, Alabama.
>
> Although this office made every endeavor to furnish qualified workers to this contractor, unnecessary delays were caused in furnishing many qualified workers

because they were not available at the time requisitions were received from the contractor.

In many instances, qualified workers requested did not report to the contractor within a reasonable length of time. The time that elapsed from receipt of requisitions until men reported was excessive.

Yours very truly,

H. S. KENT
District Manager

Upon receipt of this letter the constructing quartermaster prepared the extension order set out above, and forwarded it to the Quartermaster General in Washington. It was signed and returned to the constructing quartermaster, who delivered it to plaintiff on August 9, 1936.

A careful review of all the evidence convinces us that Kent's affidavit was a piece of manufactured evidence, that it was misleading, and did not state the true facts.

Plaintiff from his home office in Knoxville, Tennessee, was constantly writing his superintendent, urging him to ask for extensions of time on one pretext or another. The first such letter was written on January 9, 1936, before the job had hardly got under way. It read in part:

> Do not fail to begin to ask for extension of time on everything you have an excuse for and do not wait until later on in the job. Get on the good side of Ebeling so he will grant us all the extensions we may need.

As another sample of such letters, we quote the following written on March 18, 1936:

> One thing we must do is to get requisitions in, in writing, and to keep asking for extension of time. Set out in your letters that our overhead is tremendous due to their not furnishing sufficient numbers of workmen and write them a letter every few days. DO NOT FAIL TO DO THIS. [sic] We have gone on record from this office stating that we are going to enter a claim for this overhead but, confidentially, we do not believe the Government will allow us anything for any claim we may set up for this. However, if you keep your files built up properly, then we have a better chance. It will also help in getting the extension of time.

After Wright had secured from Kent the above affidavit he wrote plaintiff as follows:

> After talking with Spear and explaining the situation to him, he agreed to leave it up to Kent. After chewing the rag awhile I finally got Kent to agree to it and I took him to town and a Notary Public and got it fixed up. I am enclosing a copy of the affidavit.
>
> It occurs to me that these affidavits or affidavit affords us valuable evidence should you elect to claim for damages against the Government. That is why I made the copy before turning the original over to the Major (the Constructing Quartermaster). Our claim for damages or additional cost caused by the labor situation can well be substantiated by the affidavit, which clearly states that we are unable to procure men as and when needed.

Kent was introduced as a witness for the plaintiff. He was loath to admit that he had copied the letter written by Wright, but upon cross examination did so, inferentially at least. He reiterated on the stand the statements made in the affidavit, but he confessed that the requisitions for laborers and the records of when these requisitions were filled did not support his affidavit,—why, he could not explain. He further admitted that some men he had sent to the job were not given employment because of the weather or because materials had not arrived or "something like that."

Major Jabelonsky, the constructing quartermaster, stated on the stand that he had recommended the granting of an extension of time of 120 days on account of an insufficient supply of labor, but he admitted that in doing so he had taken into consideration a number of other things which had caused delay, such as weather conditions, incorrect work which had to be changed, faulty installation of reenforcing steel, defective stone, delay in delivery of stone, and "an awful lot of delays" due to tardy delivery of other materials, and "considerable delay" due to "door bucks." All of these things he said he took into consideration in recommending the extension of 120 days. He said the reason the extension was based alone on the labor difficulties was because the Government was not responsible for the other delays, and that he wanted to give "the contractor a break."

Defendant offered the testimony of a number of witnesses which led strongly to the conclusion that there had not been

an insufficient supply of qualified labor. However, the commissioner of this court felt bound by the facts stated in the order granting the extension of time and reported to the court that there had been a delay of 120 days due to an insufficient supply of qualified labor.

After the case was argued before the court, it was remanded to the commissioner for the taking of further testimony on this question. Further testimony was taken. The defendant introduced witness after witness, all of whom testified that, instead of there being an insufficient supply of qualified labor, there was an abundant supply. They testified that men came to the job day after day seeking work, sent there by the United States Employment Service, but were turned away and told to come back later. Fourteen or more such witnesses were introduced, after which the acting commissioner stopped the introduction of further testimony. One witness was the business manager of the carpenters' union; another was the financial secretary of the carpenters' union; another was the business agent for the carpenters' local; another was the business agent of the bricklayers' union; others were carpenters and bricklayers who had been sent to the job by the Employment Service and had been turned away; others were carpenters and bricklayers who had worked on the job and who were familiar with the labor situation. Typical of their testimony is that of the witness C. J. Martin. He says:

> * * * I was going out there day after day and morning after morning, I will say, rather, burning up everything I could get in gas and oil, to see if I could get on to work, just standing around out there, trying to get on for work, and it was not only me, but others were out there in the same shape.
>
> Q. And what would they say to you on these occasions?
>
> A. Sometimes they would say "We haven't got the material," or "we haven't got room for you," or "wait a while and we will put some more men to work in a little while," and different things like that.
>
> * * * * *
>
> Q. And you said that you exhausted your money and gasoline?
>
> A. Yes, sir, I exhausted everything, we didn't have much work here then and hadn't had for sometime, and everything was pretty trying for the carpenters then.

Major Jabelonsky was recalled for further examination. He was asked:

> Q. Now, it appears from the language of this extension order, Col. Jabelonsky, that the extension of time of 120 days was based upon the Government's failure to furnish an adequate supply of labor. I want to ask you this question as a matter of fact, if you know first-hand that Worsham Brothers was or was not delayed any because of an inadequate supply of labor?

He answered:

> A. They were not.

After ruling on the objection of plaintiff's attorney, the commissioner ordered the question repeated to the witness. His reply was:

> They were not delayed by labor whatever. There was more than an ample supply of labor at all times.

He was then asked:

> State the facts concerning your recommendation to Col. Pitz regarding this extension of time.

He answered:

> The contractor, at the contractual end of the contract, was very much behind. He had considerable difficulty with the weather, materials, etc. There was a penalty calling for liquidated damages which we wanted to save the contractor from paying. There was mismanagement on the job unbeknownst to Mr. Worsham. He had considerable difficulty the first part of the year on account of delay upon delay. I felt sorry for the contractor, and we wanted to help him along. The only way to help him along was to give him an extension of time. We could not give an extension of time on account of the weather. The peculiarities of Government contracts are that a contractor is supposed to know about the weather in advance. He had considerable difficulty from materials, etc. Now, the contract, out of the Government regulation, doesn't permit an extension of time on account of weather conditions, and the only thing we could say was the labor. As a matter of fact, it wasn't labor at all. I am making a clean breast of it, which I did before a couple of times. It was due entirely to save the contractor from paying liquidated damages and help him along so to speak, to give the poor contractor a break all the way through.

He further testified:

> Q. I will ask you whether or not this is a fact, that at the completion date, as fixed by the terms of the contract, the Government was not really in need of the building at that time or later and it would not make any material difference whether or not the contract was finished exactly on that day?
>
> A. No, sir. We had no need for the building for probably two or three months thereafter. We didn't need the building at that particular contractual date. In matter of fact, troops didn't move there until considerably after the contract was complete all the way through. Now, that was one of the reasons we wanted to give the contractor a break. We had no particular need for the building at the time. There were no troops, nobody to occupy the building.
>
> Q. Did you take that into consideration or not when you made this indulgence——
>
> A. Of course I did.
>
> Q. (Continuing). Concerning Worsham?
>
> A. Of course I did.
>
> Q. I will ask you, Col. Jabelonsky, if complaints came to your office there concerning the way and manner in which Worsham Brothers' superintendent was handling his labor?
>
> A. Yes, sir; very frequently, more or less two or three a week.
>
> Q. I will ask you what was the nature of those complaints, who made them, and who was present at the time?
>
> A. I always made a point to have the contractor's superintendent, the contractor's foreman, at my office in order to see if I could settle this matter with the labor. Most of the troubles with the labor was that they had been sent out there, many, many times been sent out by the employment agency to go to work.

He repeated the foregoing testimony on cross-examination. He was asked:

> Q. And you mean to tell the court, and you want the court to understand that in this case you recommended that an extension of time be granted on account of labor conditions when you knew that there wasn't any delay on that account?
>
> A. I did. Yes sir; in order to give the contractor a break. I will say that again.

We are convinced that the defendant not only furnished plaintiff sufficient qualified labor, but that it furnished him more than he could use and, therefore, that plaintiff is not entitled to recover damages for this 120 days of delay.

The next item is for increased cost to plaintiff for the salt-glazed tile base. Under the contract all walls and partitions, with certain exceptions, were to be constructed of building tile or to be plastered in lieu of the construction specified. The construction specified was salt-glazed tile to the full height of the walls and partitions and, if the salt-glazed tile was not used, then a deduction was to be made for plastering. Plaintiff elected to plaster the walls and partitions and a deduction was made. The constructing quartermaster required plaintiff to install salt-glazed tile at the bases and then plaster to the ceiling. Plaintiff contends that the provision did not require that the bases of the walls and partitions be of salt-glazed tile. On the plans the letters "S. G. T. B." were plainly marked which showed to the contractor that salt-glazed tile base was required. From the terms of the contract and plans it is quite clear that the construction placed on the contract by the constructing quartermaster is correct. There can be no recovery on this item.

We are of opinion plaintiff is not entitled to recover. His petition, therefore, will be dismissed. It is so ordered.

LITTLETON, *Judge*, concurs.

MADDEN, *Judge*, concurring:

I concur in the decision of the court, and agree with its analysis of the evidence and the conclusions which it draws therefrom. I wish, however, to discuss two additional points which I regard as important.

First. I think that, in the circumstances, there would have been no breach of contract on the part of the United States even if the plaintiff had suffered from a lack of labor. Paragraph S–C 3 of the specifications is quoted in finding 3 and in the opinion of the court. It relates to the employment of union labor, which the plaintiff apparently "desired and requested." The plaintiff's position, with regard to this pro-

vision of the contract, is very simple. It is that the Government guaranteed him an adequate supply of qualified union labor as he should requisition it and that, if the supply was not forthcoming as requested, the Government breached its contract and became liable to him for all damages resulting from the inadequacy of the supply of labor. The plaintiff's counsel stated at the oral argument that he did not claim that the Government had not done its best to supply the plaintiff with labor, but only that it did not supply it. And the plaintiff's evidence and briefs contain no suggestion that there was any lack of diligence, or of consideration of the plaintiff's needs, on the part of the agents of the Government who conducted its employment service. The plaintiff has cited *Young-Fehlhaber Pile Co.* v. *United States*, 90 C. Cls. 4, as supporting his construction. I do not so read that decision. In our recent case of *York Engineering and Construction Company* v. *United States*, No. 45282, [*post*, p. 613], in answer to a contention of the plaintiff in that case identical with the plaintiff's contention in this, we said that the Government's obligation was to permit the contractor to get his work forward, by allowing him to obtain labor outside the contract, if the contract source proved to be harmfully inadequate. We pointed out that in the *Fehlhaber case* the contractor had requested permission to use his own men, but the Government's agents had "in effect declined to consider" this request and had told him to "go along with what he had."

In the instant case the plaintiff never even resorted to the alternative source of labor supply which was expressly written into paragraph S–C 3, as follows:

> In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment agency has notified the unions of the receipt of such request, such labor may be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service.

There is not a word in paragraph S–C 3 of the specifications which says or suggests that the Government guarantees

an adequate supply of labor. The paragraph did not apply to the plaintiff at all unless and until he "desired and requested" to use union labor. If he so desired and requested, S–C 3 provided an orderly procedure whereby he could make his contacts with the unions and the Government could keep its employment and statistical records. He, not the Government, had the choice of whether he wanted to deal with union labor. According to his contention, he could have so chosen, though there were practically no union men in the vicinity, and the Government would have underwritten the deficit and all resulting damages. After the supply proved inadequate, as the plaintiff asserts that it did, he, not the Government, had the choice of whether he would employ non-union workers. If he did not, in spite of his predicament, choose to do so, the plaintiff contends that the Government could do nothing but let damage claims pile up against it.

No such contract was written. We would not be justified in resorting to implication to create such an extraordinary bargain. The Government does not require contractors to agree, at their peril, to do the impossible. It provides, in Article 9, that if delays occur due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, the contractor is excused from going forward, no matter how much the Government may be damaged. Yet the plaintiff sues the Government for not doing the impossible, even though it did not promise to do it. I think there was no such contract and hence, of course, no breach.

Second. The plaintiff claims that, regardless of what the facts are with reference to the adequacy of the supply of labor, this court is bound to find that the supply was inadequate, and that it delayed the plaintiff 120 days, because the Contracting Officer so found.

I do not understand how an officer in an executive department of the Government, who has not by statute, or even by contract, been given authority to decide that the Government is liable to the plaintiff in damages for breach of contract, can so decide, and thus foreclose this court, which has, by an elaborate and deliberately considered statute, been given jurisdiction to decide that very question, from deciding it. This court has no right to abdicate the important duty con-

ferred upon it, and to assume the role of merely computing damages in dollars and cents to fill out another man's judgment. As a judgment, then, I think the decision of the Acting Contracting Officer is completely irrelevant to our case. He did his work. It was to determine whether the Government would forgive, or insist upon, liquidated damages for late completion of the work. We should do our work. It is to determine whether the Government breached its contract, and if so, whether the plaintiff incurred damages as a result of the breach. The Acting Contracting Officer's "determination," not being binding as a judgment, how does it stand as evidence of the facts? It is worthless. He testified, and nobody doubts, that he does not and never did know anything about the facts.

WHALEY, *Chief Justice*, dissenting:

When the Government's agent testifies or certifies in writing that the necessary labor as requested could not be supplied by the "Employment agencies designated by the United States Employment Service" a prima facie case of a breach of contract under Paragraph S–C 3 of the contract is made out. I do not think this evidence was ever overthrown by defendant's other witnesses. I am of the opinion that there was a breach of contract by the defendant, and that the plaintiff suffered damages as a result thereof and should recover the loss.

JONES, *Judge*, took no part in the decision of this case.

THE JOHN HARSCH BRONZE & FOUNDRY CO., A CORPORATION, v. THE UNITED STATES

[No. 44241. Decided April 2, 1945]

On the Proofs

Increased labor costs under National Industrial Recovery Act; contracts entered into prior to August 10, 1933.—Where plaintiff, before August 10, 1933, had entered into the three subcontracts on Government buildings on which suit is brought; it is *held* that the instant suit is within the provisions of the Act of June 25, 1938. (52 Stat. 1197).

Same; recovery allowed for irregular wage increases due to enactment of National Industrial Recovery Act.—Where, after signing the President's Reemployment Agreement, the plaintiff in August, September, and October 1933, granted wage increases which were not uniform but irregular; and where after the effective date of the Code of Fair Competition for its industry, which was November 12, 1933, raises to the new minimum fixed by the Code were made, and adjustments for those above the minimum were made, but again these increases were not uniform; and where thereafter during the period of performance of each of the three contracts occasional increases in wages were made to some employes and new employes were hired at the increased wage rates; it is *held* that the plaintiff is entitled to recover only for all wage increases made by it in August, September, October, and November 1933, at which time plaintiff, pursuant to its Agreement or to the Code, was revising its wage schedules "as a result of the enactment" of the National Industrial Recovery Act.

Same; higher wages for new employees after enactment of National Industrial Recovery Act.—Where it is satisfactorily shown by the proof that wages of the employees newly hired after the N. I. R. A. increases were higher than they would have been if the N. I. R. A. had not been enacted; plaintiff is entitled to recover.

Same; evidence; lack of cross-examination; check of evidence by comparison.—Proof consisting of schedules in which the wage which the job would have rated before the N. I. R. A. had been set by a process of "grading" the new employee by comparing his work with that of old employees and his wage rate with the wage rate of the old employees before the N. I. R. A., where the officials who did the grading were not subject to cross-examination, is not, by itself, satisfactory evidence; but when these schedules are checked by comparing the claimed amounts of wage increases asserted to be included in the wages of new employes with the increased amounts proved to have been paid to old employees for the same period of work; it is satisfactorily established that the grading of jobs was approximately correct, and plaintiff is entitled to recover.

Same; wages in higher brackets increased under President's Reemployment Agreement and Code of Fair Competition.—Under the President's Reemployment Agreement and the Code of Fair Competition, the plaintiff was as much required to make equitable adjustments of wages in the higher brackets as to bring subminimum wages up to the minimum.

Same; irregular increases made to effect equitable adjustment.—The fact that wage increases, made as the result of the enactment of the National Industrial Recovery Act, were not entirely uniform

does not prove that the increases were not made in an effort toward an equitable adjustment.

Same.—The evidence in the instant case shows that all wage increases which were made by the plaintiff, in the period when N. I. R. A. increases were being made, were made as a result of the National Industrial Recovery Act, and plaintiff is entitled to recover under the provisions of the Act of June 25, 1938.

Same; limitation on filing of claims under 1934 Act.—Where there was produced by plaintiff no direct evidence to show that the claims in the instant case were filed within the time set in the Act of June 16, 1934 (48 Stat. 975), as required by the Act of June 25, 1938 (52 Stat. 1197) but where the claims, which are in evidence, show that they were prepared and notarized by the plaintiff within the time limitation of the 1934 Act; and where subsequent correspondence states that the claims were filed at specified times within six months after the completion of the several contracts, to which statements no exceptions were made by the Government officials who considered the claims; it is *held* that the claims were timely filed.

The Reporter's statement of the case:

Mr. William E. Carey, Jr., for the plaintiff. *Messrs. Rhodes, Klepinger & Rhodes* were on the brief.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a domestic corporation with its principal place of business at Cleveland, Ohio.

2. This action is brought pursuant to the act of June 25, 1938 (52 Stat. 1197), conferring jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933.

3. May 5, 1933, plaintiff entered into a contract with Frank Messer & Son, Inc., general contractor, which had, also on that date, entered into a contract, No. T1sa-4337, with the United States for the construction of a post-office building at Nashville, Tennessee. By the terms of its contract with Messer plaintiff was required to furnish certain aluminum, white bronze, and corrosion-resisting steel for use in the construction of the post-office building.

4. June 24, 1933, plaintiff entered into a contract with The Lundoff-Bicknell Company, general contractor, which had, on November 30, 1932, entered into a contract, No. T1sa–3761, with the United States for the construction of a post-office building at Cleveland, Ohio. By the terms of its contract with Lundoff-Bicknell, plaintiff was required to furnish all ornamental metal work and all aluminum windows for use in the construction of the post-office building.

5. December 24, 1932, plaintiff entered into a contract with the George A. Fuller Company, general contractor, which had, on December 1, 1932, entered into a contract, No. T1sa–3764, with the United States for the construction of the Archives Building, Washington, D. C. By the terms of its contract with Fuller, plaintiff was required to furnish certain aluminum, white bronze, and corrosion-resisting steel for use in the construction of the Archives Building.

6. Each of the contracts referred to in findings 3, 4, and 5 was fully performed by plaintiff and plaintiff was paid the contract price provided therein.

Plaintiff's performance of the work required under its subcontracts was completed in August 1934, on the Nashville, Tennessee, post office; in September 1934, on the Cleveland, Ohio, post office; and in April 1935 on the Archives Building in Washington, D. C. The general contracts were completed in March 1935, on the Nashville, Tennessee, post office; in January 1935, on the Cleveland, Ohio, post office; and in January 1937, on the Archives Building.

7. Plaintiff executed the President's Reemployment Agreement authorized by Section 4a of the National Industrial Recovery Act, but the agreement executed by plaintiff is not in evidence, and there is no evidence as to the exact date on which plaintiff executed it. A standard form of the President's Reemployment Agreement was filed as Defendant's Exhibit 4 and is by reference incorporated herein.

8. As of August 25, 1933, the Administrator of the National Industrial Recovery Administration, upon the petition of representatives of the fabricated metal products industry, elected under Section 13 of the President's Reemployment Agreement to substitute for paragraphs 2, 3,

and 6 of the President's Reemployment Agreement the following provisions of the Code submitted for the fabricated metal products industry:

For paragraph 2 of President's Agreement. Code reference: (Article II, Section 6)

Employees (other than executive, administrative and supervisory employees who are now receiving $35 or more per week; and factory or mechanical workers or artisans, watchmen, outside sales and service men) shall not be employed more than 40 hours per week, provided, however, that they may be employed for one week of 48 hours during each one month's period.

For paragraph 3 of President's Agreement. Code reference: (Article II, Section 6)

No factory or mechanical worker or artisan (except emergency repair employees) shall be employed for more than 40 hours per week, provided, however, that these limitations shall not apply to branches of this industry in which seasonal or peak demand or breakdown places an unusual and temporary burden upon such branches and provided, however, that in no case shall the hours worked in any one week exceed 48 hours and provided, further, that the number of hours over 40 per week worked in any six months' period shall not exceed 32.

For paragraph 6 of President's Agreement. Code reference: (Article II, Sections 3, 4, and 7)

No factory or mechanical worker or artisan shall be paid less than 35¢ per hour for males and 30¢ per hour for females unless the hourly rate for the same class of work on July 15, 1929 was less than the above specified minima, in which latter case they shall be paid not less than the hourly rate on July 15, 1929 and in no event less than 30¢ per hour for males and 25¢ per hour for females and provided, further, that learners and apprentices may be paid not less than 80% of the above minimum wages for a period of not to exceed three months, but the total number of such learners and apprentices shall not exceed 5% of the total number employed by any such employer in any calendar month, provided, further, however, that where female employees do substantially the same work or perform substantially the same duties as male employees, they

shall be paid the same rate of pay as male employees are paid for doing such work or performing such duties. This paragraph establishes a guaranteed minimum rate of pay regardless of whether the employees are compensated on the basis of a time rate or on piece-work performance.

9. The Code submitted for the fabricated metal products industry was applicable to plaintiff's business, and plaintiff operated under the President's Reemployment Agreement as modified by the substituted provisions of that Code until November 12, 1933, the effective date of the Code.

10. The Code of Fair Competition for the Fabricated Metal Products Industry was approved by the President on November 2, 1933, and became effective November 12, 1933. Plaintiff operated under this Code after its effective date. A printed copy of the Code was filed as Defendant's Exhibit 7 and is incorporated herein by reference.

11. Plaintiff had 309 employees on its pay rolls during the performance of the three contracts in suit, of whom 286 were paid wages at hourly rates. One hundred and eighty of these employees performed work on one or more of plaintiff's subcontracts and it claims increased labor costs for these employees. Of these, 74 were employees whose names appeared on plaintiff's pay rolls prior to August 18, 1933, and 106 were hired after August 18, 1933. Between August 18 and December 1, 1933, plaintiff gave increases in wages to most of its employees who were in its employ on August 18, 1933, and who performed either direct or indirect labor on the three contracts involved in this suit. Increases were granted to 22 of its employees receiving less than the President's Reemployment Agreement or Code minima and to 36 employees receiving more than those minima. Thereafter, and from time to time throughout the performance of the three contracts, additional increases were given to some of these employees. Later, increases were also granted to 16 of plaintiff's employees performing direct and indirect labor on the three contracts who had received no increase in wages during the period August 18 to December 1, 1933, but whose prior rate of wage was in excess of the minima of the President's Reemployment Agreement and the Code.

Plaintiff also, from time to time throughout the performance of the three contracts, hired new employees after August 18, 1933, who performed direct or indirect labor on the three contracts. These employees were hired at wage rates which were higher than the rates paid for similar work before August 18, 1933. The increased rates were paid to 9 of these newly hired employees who started work prior to December 1, 1933, and who worked at jobs which, before August 18, 1933, carried wage rates in excess of the minimum of the President's Reemployment Agreement. The increased wage rates were paid to 84 of these newly hired employees who started work prior to December 1, 1933, and 13 who started work between January 1 and June 30, 1934, and who worked at jobs which, before August 18, 1933, carried wage rates less than the minimum of the President's Reemployment Agreement, or equal to that minimum.

12. During the period August 18 to December 1, 1933, while the work under the contract was being performed on the United States post-office building at Nashville, Tennessee, plaintiff increased the wages of 49 of its employees who were in its employ on August 18, 1933, and remained in its employ and performed direct labor on that job.

During its entire period of performance of that same contract, i. e., down to August 1934, plaintiff hired 43 employees who performed direct labor on this job, but who had not been in its employ on August 18, 1933. It hired these new employees at wage rates higher than those in effect before the taking effect of the National Industrial Recovery Act and the Code, because the wage rates for the jobs into which they were hired had been increased during the period August 18 to December 1, 1933.

The total increase in plaintiff's direct labor costs on the Nashville job as a result of increases given to old employees and of the higher rates at which new employees were hired, as shown in this finding, was $2,155.26.

13. During the period August 18 to December 1, 1933, while the work under the contract was being performed on the United States post-office building at Cleveland, Ohio, plaintiff increased the wages of 57 of its employees who

were in its employ on August 18, 1933, and remained in its employ and performed direct labor on that job.

During its entire period of performance of that same contract, i. e., down to September 1934, plaintiff hired 102 employees who performed direct labor on this job, but who had not been in its employ on August 18, 1933. It hired these new employees at wage rates higher than those in effect before the taking effect of the National Industrial Recovery Act and the Code, because the wage rates for the jobs into which they were hired had been increased during the period August 18 to December 1, 1933.

The total increase in plaintiff's direct labor costs on the Cleveland job as a result of increases given to old employees and of the higher rates at which new employees were hired, as shown in this finding, was $5,645.55.

14. During the period August 18 to December 1, 1933, while the work under the contract was being performed on the Archives Building at Washington, D. C., plaintiff increased the wages of 54 of its employees who were in its employ on August 18, 1933, and remained in its employ and performed direct labor on that job.

During its entire period of performance of that same contract, i. e., down to April 1935, plaintiff hired 51 employees who performed direct labor on this job, but who had not been in its employ on August 18, 1933. It hired these new employees at wage rates higher than those in effect before the taking effect of the National Industrial Recovery Act and the Code, because the wage rates for the jobs into which they were hired had been increased during the period August 18 to December 1, 1933.

The total increase in plaintiff's direct labor costs on the Archives Building, as a result of increases given to old employees and of the higher rates at which new employees were hired, as shown in this finding, was $4,488.40.

15. In the performance of plaintiff's contracts during the calendar years 1933 and 1935, the cost of indirect labor was, in plaintiff's accounts, charged to the particular job for which such indirect labor was performed. During the calendar year 1934 accounts were kept for indirect labor which accounts did not apportion such costs to the respective jobs.

During the period August 18 to December 1, 1933, plaintiff increased the wages of 50 of its employees who were in its employ on August 18, 1933, and remained in its employ and performed indirect labor during the calendar year 1934.

During the same period plaintiff hired 34 new employees, and two additional ones in April and June 1934, who performed indirect labor during the calendar year 1934, but who had not been in its employ on August 18, 1933. It hired these employees at wage rates higher than those in effect before the taking effect of the National Industrial Recovery Act and the Code, because the wage rates for the types of work into which they were hired had been increased during the period August 18 to December 1, 1933.

The total increase in plaintiff's indirect labor costs as a result of increases given to old employees and of the higher rates at which new employees were hired, as shown in this finding, was $824.71. Of this amount, $143.00 is allocable to the Nashville, Tennessee post office; $182.84 is allocable to the Cleveland, Ohio, post office; and $140.20 is allocable to the Archives Building.

16. Plaintiff's employees were generally classified as "unskilled" if their wage rates prior to August 18, 1933, were from 20 cents per hour to 35 cents per hour, and "skilled" if their rates were more than 35 cents per hour. By using this division, the evidence shows that plaintiff increased 22 of its unskilled employees between August 18, and December 1, 1933, who were in its employ on August 18, 1933. These employees continued in plaintiff's employ and performed 23,602 hours of direct labor on plaintiff's contracts, for which plaintiff paid increased wages of $2,692.31, or an average increase of 11.41¢ per hour.

During the period of performance of its contracts and down to June 1934, plaintiff hired 97 additional unskilled employees at wage rates in excess of the rates paid by it for comparable work prior to the enactment of the National Industrial Recovery Act. These employees performed 36,-003¼ hours of direct labor on plaintiff's contracts, for which plaintiff paid increased wages of $4,093.97, or an average increase of 11.37¢ per hour.

In like manner plaintiff increased 36 of its skilled employees between August 18, and December 1, 1933, who were in its employ at August 18, 1933. These employees continued in its employ and performed 70,584¾ hours of direct labor on plaintiff's contracts, for which plaintiff paid increased wages of $5,010.72, or an average increase of 7.10¢ per hour.

During the months of September, October, and November, 1933, plaintiff hired 9 additional skilled employees at wage rates in excess of the rates paid by it for comparable work prior to the enactment of the National Industrial Recovery Act. These new skilled employees performed 6,139¼ hours of direct labor on plaintiff's contracts, for which plaintiff paid increased wages of $492.21, or an average of 8.02¢ per hour.

17. The increases in wages set out in findings 12 to 15, inclusive, and the cost thereof to plaintiff totaling $12,755.25, resulted from the enactment of the National Industrial Recovery Act.

18. Plaintiff duly presented claims pursuant to the act of June 16, 1934 (41 U. S. C., Sections 28–33), within the limitation period prescribed by Section 4 of said Act.

19. There is no satisfactory proof to support and establish other claims set out in plaintiff's petition in this case.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is brought pursuant to the Act of June 25, 1938, 52 Stat. 1197, to recover increased costs which, the plaintiff asserts, it incurred "as a result of the enactment of the National Industrial Recovery Act," in its performance of three subcontracts under which it furnished metal trim, doors, window frames and other metal parts for post offices at Cleveland, Ohio, and Nashville, Tennessee, and for the National Archives Building at Washington, D. C.

The plaintiff had entered into its subcontracts before August 10, 1933, and was therefore within the provisions of the 1938 Act. It signed the President's Reemployment Agreement, which was modified by the Administrator of

the N. I. R. A. by substituting certain provisions of a proposed code for the fabricated metal products industry. As so modified, the agreement fixed a minimum of 35 cents an hour for male factory workers. It also provided that employees receiving more than the prescribed minimum should receive increased pay "by an equitable adjustment of all pay schedules."

A Code of Fair Competition for the Fabricated Metal Products Industry became effective November 12, 1933. It fixed the minimum wage at 40 cents, and provided:

> Equitable adjustments to maintain differentials existing as of May 1, 1933 in all pay schedules of factory employees (and other employees receiving less than $35.00 per week) above the minimums, shall be made on or before fifteen days subsequent to the effective date of this code by any employers who have not heretofore made such adjustments, or who have not maintained rates comparable with such equitable adjustments.

The plaintiff raised wages, after signing the President's Reemployment Agreement, in August, September, and October, 1933. These increases were somewhat irregular. Some employees who received less than the N. I. R. A. minimum were not raised at all during this period, while others were raised to amounts less than the minimum, or to the minimum, or above it. Raises for those already receiving more than the minimum were likewise not uniform. When the Code took effect in November raises to the new minimum of 40 cents, and adjustments for those above that amount were made, but again these increases were not uniform. Occasional increases in wages were made to some employees, long after the taking effect of the Reemployment Agreement and the Code and as late as September 1934 on the Cleveland job, August 1934 on the Nashville job, and April 1935 on the Archives job. Many new employees were hired by the plaintiff after it had raised its wages in the fall of 1933. They were hired at the higher wage rates which had been set by the increases granted to employees already on the pay roll.

The plaintiff claims that it should recover for all increases in wages made by it during the entire period of perform-

ance of each of the three contracts. We disagree. We think that the increases made in August, September, October, and November 1933, at which time the plaintiff, pursuant to its agreement or to the code, was revising its wage schedules, are the only increases which can be said, with any certainty, to have occurred "as a result of the enactment" of the N. I. R. A. Individual wage increases are constantly being made in enterprises like the plaintiff's, as employees increase their productive skills on the same job, or are moved to higher paying jobs. We have no reason to suppose that such increases in the wages paid by the plaintiff were caused by the N. I. R. A.

The plaintiff claims that the wages of the employees newly hired after the N. I. R. A. increases were higher than they would have been if the N. I. R. A. had not been enacted, and that it should recover the amount of these increases. We agree. The Government contends that the plaintiff has not adequately proved what these increases were. The proof consisted of schedules presented by the plaintiff's auditor, in which the wage which the job would have rated before the N. I. R. A. had been set by a process of "grading" the new employee by comparing his work with that of old employees, and his wage rate with the wage rate, before the N. I. R. A., of the old employees. This method seems to us to be proper. But the Government complains that the superintendent and other officials of the plaintiff who did the grading did not take the witness stand, so that they could be examined on the validity of their grading, about which the auditor who testified had no knowledge. This is a valid complaint, and this evidence, taken by itself, would not be sufficient. We have, however, checked these schedules by comparing the claimed amounts of wage increases asserted to be included in the wages of new employees with the increased amounts proved to have been paid to old employees, for the same period of work, and are satisfied that the grading of jobs was approximately correct. We therefore allow this item of the plaintiff's claim.

The Government would have us disallow all increases above the fixed minima of 35 cents per hour for the Reemployment Agreement period and 40 cents for the Code

period. But the plaintiff was as much required to make equitable adjustments of wages in the higher brackets as to bring sub-minimum wages up to the minimum. The fact that the increases were not entirely uniform does not prove that they were not made in an effort toward an equitable adjustment. We have no basis for determining what would have been complete equity as to any individual workman, or for disallowing an increase which tended toward, though it did not accomplish full equity. We think that the evidence shows that all increases which were made in the period when N. I. R. A. increases were being made, were made as a result of the N. I. R. A., within the meaning of the 1938 act.

The Government urges that the plaintiff has not proved that it filed claims within the time set in the Act of June 16, 1934, 48 Stat. 975, 41 U. S. C. 31, as required by the Act of June 25, 1938. The plaintiff did neglect to introduce any direct evidence on that point. But the claims made under the 1934 act are in evidence, produced by the General Accounting Office in response to a call issued by this court. They show that they were prepared and notarized by the plaintiff well within the times set for their filing by the 1934 act. Thus they were ready for filing in time. The office of the Director of Procurement, to which they were sent, placed no mark on them showing the date of filing. But subsequent letters from the plaintiff to that office in regard to the claims referred to the claims as having been filed at specified times which were within six months after the completion of the several contracts. No exception to those statements was taken by the officers of the Government who considered the claims, and the claims were never treated as if they had not been timely filed. We have no doubt that they were so filed.

The plaintiff is entitled to recover $12,755.25. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ROBERT O'HAGAN v. THE UNITED STATES

[No. 45528. Decided April 2, 1945]

On the Proofs

Pay and allowances; Navy officer entitled to travel pay under order which was not modified or revoked.—Where plaintiff, an officer in the Navy, received orders, dated June 26, 1939, to regard himself as detached from duty at the Naval Station, Guantanamo Bay, Cuba, on or about August 1, 1939, and to proceed thence to New York City, reporting for duty to the Commanding Officer of the Receiving Ship there, with delay of one month to count as leave; and where on reporting for duty at New York on August 28, he received further orders, dated August 16, 1939, to proceed to the Naval Station at Great Lakes, Ill., with delay until September 30, counting as leave; and where in compliance with said orders plaintiff proceeded to New York and thence to Great Lakes, where he reported for duty on September 30, 1939; it is *held* that plaintiff is entitled to recover statutory reimbursement for travel on the basis of his trip to New York City and from New York City to Great Lakes.

Same.—The order of August 16, 1939, which was not ambiguous, did not revoke nor modify the previous order of June 26, 1939.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell and Ansell* were on the briefs.

Mr. Julian R. Wilheim, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon the stipulation entered into by the parties:

1. At all times hereinafter mentioned, plaintiff was a commissioned officer in the United States Navy on active duty, with the rank of Commander.

2. On June 26, 1939, while on duty at the Naval Station, Guantanamo Bay, Cuba, as Commander, Supply Corps, United States Navy, plaintiff was ordered by the Chief of the Bureau of Navigation to regard himself detached from duty as supply and accounting officer at said Naval Station on or about August 1, 1939, and to proceed to New York, New York, and report to the Commanding Officer of the

Receiving Ship at New York, New York, for duty. He also was authorized to delay for a period of one month in reporting at New York, New York, in obedience to said orders of June 26, 1939, the delay to count as leave. The original Navy Department orders of June 26, 1939, and endorsements thereon are marked "Exhibit A" and made a part hereof by reference.

3. Pursuant to said orders of June 26, 1939, plaintiff was detached from duty at Naval Station, Guantanamo Bay, Cuba, on August 1, 1939. He departed from said Naval Station, with his wife and minor son, on August 2, 1939, arrived at Miami, Florida, on August 5, 1939, departed from Miami, Florida, on August 6, 1939, and arrived at New York, New York, on August 24, 1939. The travel from Guantanamo Bay, Cuba, to Miami, Florida, was made on Government Transportation Request issued to plaintiff, his wife, and minor son. Plaintiff, his wife, and minor son also were authorized to travel from Miami, Florida, to New York, New York, by privately owned automobile, the commercial cost of such travel to be reimbursed to plaintiff by defendant. The original Navy Department orders of August 1, 1939, and endorsements thereon, are marked "Exhibit B" and made a part hereof by reference.

4. On August 16, 1939, the Chief of the Bureau of Navigation issued further orders, addressed to "Commander Robert O'Hagan, Supply Corps, U. S. N., The Receiving Ship at New York," to regard himself as detached from his station at the Receiving Ship, New York, New York, and to proceed and report to the Commandant, Ninth Naval District, Great Lakes, Illinois. He also was authorized to delay until September 30, 1939, in reporting at Great Lakes, Illinois, in obedience to said further orders of August 16, 1939, the delay to count as leave. The original Navy Department orders of August 16, 1939, and endorsements thereon, are marked "Exhibit C" and made a part hereof by reference. On August 28, 1939, plaintiff reported for duty to the Commanding Officer at the Receiving Ship, New York, New York, and received said further orders of August 16, 1939.

5. Plaintiff, his wife, and minor son, as directed by said further orders of August 16, 1939, traveled from New York,

New York, to Great Lakes, Illinois, by privately owned automobile and plaintiff reported to the Commandant, Ninth Naval District, on September 30, 1939.

6. Plaintiff has been reimbursed by defendant for the commercial cost of his travel by privately owned automobile from Miami, Florida, to New York, New York, and from New York, New York, to Great Lakes, Illinois, in the amount of one hundred eighty-three dollars and thirty-six cents ($183.36), representing mileage from Miami, Florida, to New York, New York, in the amount of one hundred seven dollars and ninety-two cents ($107.92), and mileage from New York, New York, to Great Lakes, Illinois, in the amount of seventy-five dollars and forty-four cents ($75.44). Reimbursement for commercial cost of travel by privately owned automobile from Miami, Florida, to Great Lakes, Illinois, would amount to one hundred eighteen dollars and seventy-two cents ($118.72), representing mileage for the distance via the shortest usually traveled route from Miami, Florida, to Great Lakes, Illinois.

7. Plaintiff is entitled to a reimbursement from defendant of fifty cents ($.50), representing his mess bill on the United States Coast Guard Cutter *Mojave*.

8. Plaintiff has been reimbursed by defendant for transportation of his wife and minor son in the amount of eighty-five dollars and eighteen cents ($85.18), representing the commercial cost of one and one-half railway fares and one Pullman section from Miami, Florida, direct to Great Lakes, Illinois. The commercial cost of one and one-half railway fares and one Pullman section from Miami, Florida, to New York, New York, and from New York, New York, to Great Lakes, Illinois, during the period from August 1, 1939, to September 30, 1939, would amount to one hundred thirty dollars and fifty-nine cents ($130.59), representing such cost from Miami, Florida, to New York, New York, in the amount of seventy-nine dollars and seventy-four cents ($79.74) and from New York, New York, to Great Lakes, Illinois, in the amount of fifty dollars and eighty-five cents ($50.85).

9. Plaintiff's claim is not a continuing one.

10. If plaintiff is entitled to both mileage and the commercial cost of transportation of his wife and minor son from

Miami, Florida, to New York, New York, and from New York, New York, to Great Lakes, Illinois, plaintiff would be entitled to the sum of forty-five dollars and ninety-one cents ($45.91), representing the difference between the commercial cost of transportation of his wife and minor son from Miami, Florida, to New York, New York, and from New York, New York, to Great Lakes, Illinois, and such cost from Miami, Florida, direct to Great Lakes, Illinois, paid to him by defendant, plus the additional allowance covering his mess bill on the United States Coast Guard Cutter *Mojave*.

11. If plaintiff is entitled to both mileage and the commercial cost of transportation of his wife and minor son only from Miami, Florida, direct to Great Lakes, Illinois, the United States would be entitled to the sum of sixty-four dollars and fourteen cents ($64.14), representing the difference between mileage from Miami, Florida, to New York, New York, and from New York, New York, to Great Lakes, Illinois, paid to plaintiff by defendant, and mileage from Miami, Florida, direct to Great Lakes, Illinois, plus the additional allowance covering his mess bill on the United States Coast Guard Cutter *Mojave*.

The court decided that the plaintiff was entitled to recover and that the defendant was not entitled to recover on its counterclaim.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff, an officer in the Navy, was ordered on June 26, 1939, to regard himself as detached from duty at the Naval Station, Guantanamo Bay, Cuba, on or about August 1, 1939, and to proceed thence to New York, N. Y., there to report to the Commanding Officer of the Receiving Ship for duty. By this order he was authorized to delay one month in reporting, the delay to count as leave.

Plaintiff left with his wife and child August 2, 1939, arrived at Miami, Fla., left Miami by private automobile, and eventually arrived by that means at New York where on August 28, 1939, he reported to the Commanding Officer at the Receiving Ship for duty.

On reporting plaintiff received further orders to regard himself as detached from his station at the Receiving Ship, and to proceed and report to the Commandant, Ninth Naval District, Great Lakes, Illinois, being also authorized to delay until September 30, 1939, in so reporting, the delay to count as leave.

To this situation is to be added the fact, and from that fact arises the dispute here, that the order detaching him from his station at New York City was dated at the Bureau of Navigation, Washington, D. C., August 16, 1939, which was between the date he left Guantanamo Bay and the latest date he could report at the Receiving Ship at New York.

The plaintiff claims he is entitled to statutory reimbursement for travel on the basis of his trip from Miami to New York City and his trip thence to Great Lakes. The defendant contends that he is entitled to such reimbursement on the basis only of a trip from Miami direct to Great Lakes, without diversion to New York City.

Settlement not having been effected on either basis, apparently, a counterclaim has been filed, and the issue is joined both on petition and counterclaim.

The order of August 16, 1939, deserves close scrutiny, and it is in detail as follows:

In reply address not the
signer of a letter, but
Bureau of Navigation,
Navy Department, Washington,
D. C. Refer to No. 9297-106
Nav-311-AG

NAVY DEPARTMENT
Bureau of Navigation
Washington, D. C.
742.

16 Aug. 1939.

From: The Chief of the Bureau of Navigation.
To: Commander
Robert O'Hagan,
Supply Corps, U. S. N.,
The Receiving Ship at New York.
Via: Commandant, Third Naval District.
Subject: Change of duty.

1. In accordance with the following instruction you will regard yourself detached from your present station,

and from such other duty as may have been assigned you; will proceed and report for duty as indicated:

To the Commandant, Ninth Naval District, Great Lakes, Ill., for duty as disbursing officer, Ninth Naval District, and additional duty as disbursing officer, Naval Training Station, Great Lakes, Ill., as the relief of Lieutenant Commander Michael J. Dambacher, (SC), U. S. N.

2. The Secretary of the Navy has determined that this employment on shore duty is required by the public interests.

3. You are hereby authorized to delay until 30 September, 1939, in reporting in obedience to these orders.

4. Keep the Bureau of Navigation and your new station advised of your address.

5. This delay will count as leave. Upon the commencement of the leave you will immediately inform this bureau of the exact date, and upon the expiration thereof you will return the attached form, giving the dates of commencement and expiration.

/S/ C. W. NIMITZ
H. M. S.

Copy to:
Bu. S & A
Cdt., 3rd Nav. Dist.
Cdt., 9th Nav. Dist.
C. O., Rec. Ship at New York.
C. O., Nav. Training Sta., Great Lakes, Ill.

In the first place the order of August 16, 1939, neither revokes nor modifies any previous order. Defendant's counsel refers to this order at least twice as "modifying" the order of June 26, 1939. The second order is quite consistent with the first. It does not even purport to modify or revoke any part of the order of June 26, 1939. Even though the first order could have been modified or revoked, in whole or in part, that was not done, and the cases cited by the defendant, where such modification or revocation took place, are therefore not in point. It was for the plaintiff to obey the orders given him.

In the second place the order of August 16, 1939, has no beginning date. This fitted nicely into the situation, for the plaintiff did not have to report for duty at New York before the first of September. He could have reported sooner, and, as a matter of fact, did report August 28, 1939.

Thereupon he received the orders dated August 16, 1939. There is nothing to indicate that the Chief of the Bureau of Navigation intended the orders of August 16, 1939, to go into effect before August 28, 1939. The order is addressed to plaintiff at "The Receiving Ship at New York." The Bureau knew when the order was addressed that it would only reach plaintiff and be known to him when he reached the Receiving Ship at New York. Under the orders of August 16, 1939, plaintiff did not have to report at Great Lakes before September 30, 1939. The department certainly was not in great haste.

Plaintiff reported at New York City under orders and is entitled to reimbursement for travel accordingly.

There is no ambiguity about the orders and plaintiff was subject to them.

Plaintiff is entitled to recover $45.91, and the defendant's counterclaim is dismissed. It is so ordered.

Madden, *Judge;* Whitaker, *Judge;* and Littleton, *Judge,* concur.

Jones, *Judge,* took no part in the decision of this case.

NORTH PACIFIC EMERGENCY EXPORT ASSOCIATION, A CORPORATION v. THE UNITED STATES

[No. 45318. Decided April 2, 1945. Defendant's motion for new trial overruled June 4, 1945]

On the Proofs

Agricultural Adjustment Act; carrying charges on flour delayed in acceptance by purchaser.—Where, in carrying out the purposes of the Agricultural Adjustment Act (48 Stat. 31), the Government, through the Secretary of Agriculture, duly authorized the plaintiff, under a "Marketing Agreement for Disposal of North Pacific Wheat Surplus," to sell to the Chinese Government, for export, at stated prices specified quantities of wheat, in the form of wheat or flour, and where it was further provided that if the wheat or flour so sold was not accepted for shipment and loaded on or before certain specified dates, in each sale, there should be collected from the purchaser a

carrying charge of ⅛ cent per barrel per day; it is *held* that this carrying charge was not a part of the sales price and it was not the intention of the parties that such carrying charges should be used to reduce or offset any payments that might be made by the Secretary under the Marketing Agreement out of the proceeds from processing taxes.

Same; purpose of A. A. Act.—The purpose of the Marketing Agreement, under the Agricultural Adjustment Act, was to dispose, as speedily as possible, of the surplus 1932 and 1933 wheat crops; and the intention of the parties thereto was that plaintiff should be paid the difference between the purchase and sales prices, as provided therein, and that no loss should be suffered by members of plaintiff Association in executing the terms of the Agreement.

Same; plaintiff entitled to recover.—In view of the facts established by the record, the provisions of the Marketing Agreement and the findings and conclusions of the Secretary of Agriculture approving the instant claim; it is *held* that plaintiff is entitled to recover the amount of $12,172.94, representing the carrying charges on the flour from and after September 30, 1933, up to the dates on which the various shipments were made.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for plaintiff.

Messrs. Rhodes, Klepinger & Rhodes were on the brief.

Mr. W. A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

In the petition filed herein plaintiff sues to recover $12,-172.94, representing the amount alleged to be due under and pursuant to a written agreement between plaintiff and the Secretary of Agriculture known as a "Marketing Agreement for Disposal of North Pacific Wheat Surplus", dated October 10 and effective October 11, 1933, made under and pursuant to section 8 (2) of the Agricultural Adjustment Act approved May 12, 1933.

There is no dispute as to the figures making up the amount claimed by plaintiff, and the Secretary of Agriculture was of the opinion that plaintiff was entitled to be paid the amount computed and claimed under the terms and conditions of the Marketing Agreement, but the Comptroller General held that there was no legal basis on the facts and under the

Marketing Agreement for payment of the amount and declined to authorize the Secretary to pay the same.

Counsel for defendant seek to sustain the decision of the Comptroller General denying authority for payment and a subsequent decision by him declining to reconsider such refusal upon request of the Secretary.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a non-profit corporation organized under the laws of Oregon and having its principal place of business in Portland. Pursuant to the act approved May 12, 1933, 48 Stat. 31, 34, the defendant, represented by the Secretary of Agriculture, entered into a contract with plaintiff and others, dated October 10, 1933, being Marketing Agreement No. 14 and entitled "Marketing Agreement for Disposal of North Pacific Wheat Surplus." A true copy of the agreement is annexed to the petition as Exhibit "A" and is made a part hereof by reference.

2. The Marketing Agreement recited that at the time it was executed there was a carry-over from the 1932 crop estimated at 25,000,000 bushels of wheat in the States of Washington, Oregon, and Northern Idaho, the territory covered by plaintiff's business, and that a further surplus was expected from the 1933 crop. The purpose of the agreement was to effectuate the policy declared by Congress in said Act, by disposing of such surplus wheat in foreign markets or to public relief agencies.

Section 1 of the Marketing Agreement stated that membership in the Association was limited to producers or an association of producers of wheat or flour in the area mentioned above, such membership being subject to the approval of the Secretary of Agriculture.

Section 2 provided that plaintiff's business should be conducted by an executive committee of nine members appointed subject to the written approval of the Secretary, including one member designated by him. It further authorized the executive committee to appoint a managing agent, and stated that any action taken by him, the executive committee, or plaintiff had to have the approval of the Secretary.

Section 3 provided that the Association should serve as a clearing house for arranging the details of purchasing, shipping, handling, and selling wheat or flour.

Section 4 authorizes the Secretary to give written instructions to the executive committee or managing agent from time to time to contract for the purchase of wheat in the Pacific Northwest area, which instructions might include the quality of wheat to be purchased, the price to be paid, and the terms of the purchase.

3. Section 5 provided with respect to any wheat purchased pursuant to section 4, that plaintiff should receive written bids each day from its members for the purchase from it and the sale in the export trade of any part of such wheat in the form of wheat or flour, the bids to include (a) the amount to be purchased and sold, (b) the sales price of such wheat or flour in the export trade, and the time of shipment, (c) the terms of such proposed sale and shipment, including the c. i. f. bid and the specific deductions made in establishing the f. o. b. or f. a. s. price, and (d) the port or ports of destination of such wheat or flour. It stated that the sales of flour should be on the f. a. s. basis for steamer loading at Portland, Astoria, Tacoma, or Seattle. It further provided that all such bids should be submitted to the Secretary, who would then advise plaintiff's executive committee or managing agent which bids to accept. Plaintiff agreed to accept only those bids which had Secretarial approval and to transfer contracts for a sufficient amount of wheat to enable the individual members to fulfill such of their bids as were accepted by plaintiff. The members of the Association agreed to pay the purchase price for the contracts so transferred pursuant to the terms of such contracts.

Section 5 further provided as follows:

> The Secretary may, from time to time, give written instructions to the Executive Committee, or its duly appointed managing agent, to sell in the export trade or to any public unemployment relief agency any part of the wheat so purchased pursuant to Section 4 hereof, in the form of wheat or flour. Such written instructions may, in the discretion of the Secretary, include any or all of the following:

(*a*) The amount of wheat and/or flour to be sold;

(*b*) The sales prices at which such wheat and/or flour shall be sold. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, F. O. B. ship. The sales of the flour, if any, shall be made on F. A. S. basis for steamer loading at Portland and Astoria, Oregon, and Tacoma and Seattle, Washington;

(*c*) The terms of such proposed sale and shipment including the C. I. F. bids and the specific deductions made in establishing the F. O. B. or F. A. S. price;

(*d*) The port or ports of destination of the wheat and/or flour to be thus sold; and

(*e*) The purchaser to whom the wheat and/or flour shall be thus sold.

The Association and its members hereby agree to carry out and fulfill such instructions to the best of their ability.

It is expressly understood and agreed that any wheat that is purchased pursuant to the written directions of the Secretary as provided in Section 4 hereof shall not be sold except as provided in this Section 5.

4. Section 7 of the Marketing Agreement provided:

The Association shall obtain from each member, which shall have made sales pursuant to Section 5, verified statements with respect to such sales, on forms to be supplied by the Secretary. Such statements shall include the sales price for all the wheat and flour sold and the cost incurred with respect to the same in accordance with the schedules set forth in Exhibits B and C. There is attached hereto, marked Exhibit B, a schedule of the costs of handling, shipping, storing, and other charges with respect to the wheat to be purchased and sold. There is also set forth in Exhibit B an item of "selling costs" to be included among the costs to be allowed in connection with each sale made pursuant to Section 5 hereof. There is attached hereto, marked Exhibit C, a schedule of the costs of the processing of wheat into flour, handling, and packing of the same.

Any provisions of the schedule in Exhibits A, B, and C may be changed from time to time by agreement between the Association and the Secretary.

The term "Purchase Price" as used in this Agreement shall be deemed to be the price provided for in the wheat contracts purchased pursuant to Section 4 hereof and paid, pursuant to terms of such contracts, as provided in Section 5 hereof with adjustments as provided in Exhibit A.

The term "Sales Price" as used in this Agreement shall be deemed to be the F. O. B. or F. A. S. price specified in the bid submitted in connection with any sale of the wheat and/or flour made pursuant to Section 5 hereof.

The term "Net Sales Price" as used in this Agreement shall be deemed to be the Sales Price less the costs incurred (pursuant to the schedules set forth in Exhibit B or Exhibit C) in connection with any wheat sold as wheat or flour.

5. Section 8 provided:

> The Association shall, if any part of the wheat purchased is sold as either wheat and/or flour, pursuant to Section 5 hereof, present to the Secretary a verified statement, on forms to be supplied by the Secretary, showing the purchase price of such wheat, the sales price and the net sales price for such wheat and/or flour. The Secretary agrees to pay to the Association within a reasonable time of the receipt of such statement and other documents which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof, an amount equal to the difference between the purchase price and the net sales price.

6. Exhibit C of the Marketing Agreement prescribed the basis upon which the purchase price of wheat should be calculated, and contained the following schedule for the conversion of flour prices to wheat prices, basis No. 2, or better, f. o. b. track at mill terminal basis:

> (1) F. A. S. price per barrel (196 pounds) straight flour.
>
> (2) Wharfage 65 cents per ton.
>
> (3) Deduct conversion charge of 50 cents per barrel to cover preparation and processing of wheat, packing, storage of flour, administration and fixed charges, and office selling expense.
>
> (4) Deduct per barrel cost of flour sacks based on current purchase cost in 1,000 lots.
>
> (5) Add mill feed credit (70 pounds per barrel) basis current carlot prices bulk unit cost less $1.50 per ton to cover handling, selling expense, and protection against market fluctuations.
>
> (6) Divide result by 4.45, the quantity of wheat in bushels required to make a barrel of 196 pounds of straight flour.

(7) The differentials in prices for grades of flour other than straight shall be established by the Association with the approval of the Secretary.

7. July 12, 1934, the representative of the Secretary of Agriculture, duly appointed and authorized to act for the Secretary, as provided by section 13 of the Marketing Agreement, instructed plaintiff as follows:

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

#901 Lewis Building, Portland, Oregon

JULY 12, 1934.

Mr. GEORGE V. HAYES, *Managing Agent*,
North Pacific Emergency Export Association,
Lewis Building, *Portland*, *Oregon*.

DEAR MR. HAYES: Sell to the Chinese Government Agency, pursuant to Section 5 of the Marketing Agreement:

Commodity—Club Straight Flour.
Quantity—130,000 bbls. of 196# each (packed in 49# Standard Export Quarters) Buyer's brand.
Price—$2.95 per bbl. of 196#, f. a. s. ship, Willamette and/or Columbia River ports, and/or Puget Sound.
Shipment—Buyer's call, July 1934. If not loaded in July, carrying charges at the rate of 1/6¢ per bbl. per day to accrue to the seller after July 31, or the end of the strike if it is still in effect at that time.
Tonnage—Only United States flag vessels to be used.
Specifications—Moisture not to exceed 13½%, Ash .50 Specifications to be supported by official state certificate of analysis.

The control price on the above order shall be the price given to you July 11, 1934. No differential to be allowed to the mills on the above commodity.

The current millfeed price on this date is $20.00 per ton, sacked.

Yours very truly,

Signed by WM. CLOHESSY,
William Clohessy,
Representative of Secretary of Agriculture.

8. The "carrying charges at the rate of 1/6¢ per bbl. per day to accrue to the seller after July 31," set forth in the above-mentioned instructions under the heading "Shipment", represented the compensation or cost then determined by the authorized representative of the Secretary of Agriculture which would accrue to plaintiff and its members as a result of any delay of the purchaser of the flour to promptly accept delivery and shipment at the time specified, in addition to the flat rate of fifty cents per barrel carrying charge contained in item (3) of exhibit "C" of the Marketing Agreement (finding 3) for nominal costs of storage, administration, and fixed charges, which 50¢ per barrel was to be deducted in arriving at the "Net Sales Price" of flour. These carrying charges of 1/6¢ per barrel per day for delayed acceptance, after the delivery date specified in the sales contract, were not intended by the Secretary of Agriculture or the plaintiff, or the Chinese Government, to be considered as part of the "Sales Price" of the flour, as provided in the above-mentioned instructions and the Marketing Agreement, but such carrying charges were designed and intended by the parties to the Marketing Agreement, and the Chinese Government, as purchaser, to offset any additional costs incurred by plaintiff and its members as a result of delay on the part of the purchaser of the flour. The purpose of the Marketing Agreement was to dispose of the surplus wheat crop in the North Pacific wheat area, and the underlying policy and intention of the Marketing Agreement were that no loss should be sustained by members of plaintiff Association in executing and carrying out its terms and the instructions of the Secretary.

9. Thereafter, on July 14, 1934, August 1, 1934, and August 9, 1934, respectively, plaintiff received written instructions from the duly authorized representative of the Secretary of Agriculture to sell to the Chinese Government Agency for export, additional quantities of flour at $2.97½, $3.35, and $3.82½ per bbl., respectively. These instructions were similar to those quoted above, and each contained the additional provision that carrying charges at the rate of 1/6-cent per barrel per day should accrue to the seller if the flour was not

loaded after the dates stated therein, to wit, July 31, and August 31. The total quantity of flour covered by the four orders was 335,000 barrels. True copies of the selling instructions are annexed to the petition as Exhibits "B," "D," "F," and "H," and are respectively incorporated herein by reference.

10. In accordance with the selling instructions received from the representative of the Secretary of Agriculture, plaintiff entered into four written purchase contracts with the Chinese Government Agency on July 12, 1934, July 14, 1934, August 1, 1934, and August 9, 1934. The purchase contracts are in evidence as Plaintiff's Exhibits 1, 2, 3, and 4, and are made a part hereof by reference.

The purchase contract of July 12, 1934, which is similar in all material respects to the three other contracts, was as follows:

CHINESE GOVERNMENT AGENCY

Portland, Oregon

PURCHASE CONTRACT

JULY 12TH, 1934.

Specifications

Moisture—not to exceed........................ 13½%
Ash.. .50

GENTLEMEN: We confirm purchase from you, as follows:

Commodity: Club Straight flour.
Quantity: 130,000 barrels of 196# each (packed in 49# Standard Export Quarters).
Description: Buyer's brand.
Price: $2.95 per bbl. of 196#.
Delivery F. A. S. ship, Willamette and/or Columbia River ports, and/or Puget Sound.
Date of Delivery: Buyer's call, July 1934 subject to existing strike.
Remarks: ⅙ of a cent per bbl. per day carrying charges following July 31st, up to and including September 30th, 1934, any delay account strike conditions excepted. Specifications to be supported by official state certificate of analysis.

Payment: Sight draft on Reconstruction Finance Corporation, payable at Federal Reserve Bank at Portland, Oreg. against X on board b/1: * * * warehouse or elevator receipts: Draft to be drawn by Purchasing Agent of National Government of the Republic of China and delivered to seller. Following documents required:

Signed invoice—six copies.

Clean negotiable bill of lading in duplicate and four non-negotiable copies.

Chinese consular invoice in triplicate.

Inspection and weight certificates in quadruplicate.

Negotiable warehouse or elevator receipts.

Official State weights and United States Department of Agriculture grades in each case at point of loading will be final and govern settlements. Inspection and weighing charges for seller's account.

If this letter correctly sets forth our agreement, please sign and return to this office three copies thereof inclosed for that purpose, whereupon it will become a binding contract between us.

W. P. WEI,
Purchasing Agent of the National Government of the Republic of China.

By Procuration Signed by J. J. LAVIN,

Accepted:

NORTH PACIFIC EMERGENCY EXPORT ASSN.,
Signed by G. V. HAYES, *Managing Agent.*

11. The selling instructions issued by the Secretary's representative were delivered to plaintiff's managing agent, but the members of the Association did not receive copies of the orders. Under section 11 of the Marketing Agreement, it was the duty of plaintiff's managing agent to allocate the sales of the contracted wheat purchased by the Association, the processing of the wheat and flour, and the sale of the flour for export, fairly and equitably among the members of the Association, with due consideration for the financial ability and facilities of each member to handle such sales and milling.

12. At the time the selling instructions were delivered, the Secretary's representative requested plaintiff's managing agent to wait a day or two before making the allocation. In

making such allocation, plaintiff's managing agent did not inform the members of the Association of the provisions in the selling instructions regarding the dates after which carrying charges would accrue to the seller. Instead he advised them that they would be entitled to receive carrying charges at the rate of ⅙-cent per barrel for each day after September 30 that the buyer delayed its acceptance of the flour. This was due to a statement to plaintiff by the Chinese Agency that it would probably not be able to order shipment before October 1, 1934. The selling instructions and the contracts of sale of flour, however, provided that the carrying charges were to accrue to the seller after July 31, 1934, on the first two orders, and after August 31, 1934, on the other two orders.

13. The strike referred to in the instructions of the Secretary's representative and in the contracts with the Chinese Government Agency was a strike by the longshoremen which was then in progress at the ports on the West Coast where the flour sold by plaintiff was to be loaded. It was the responsibility of the Chinese Government Agency to provide the ships in which the flour was to be loaded. Although the strike terminated on July 31, 1934, the Chinese Government Agency failed to provide the necessary ships promptly so that deliveries of flour by plaintiff's members were delayed.

Plaintiff's members shipped the flour on various dates between August 16, 1934, and December 6, 1934. In addition to the sales price of the flour, plaintiff collected carrying charges from the Chinese Government Agency at the rate and for the time provided for in the selling instructions and contracts, the total amounting to $37,353.38.

14. During all times material to this action, the Comptroller of the Department of Agriculture had field auditors stationed at Portland, Oregon, whose duty it was to examine and certify all vouchers submitted by plaintiff for payment of the difference between the purchase price of the wheat and the net selling price of the flour as shipments were made from time to time. As deliveries were made to the Chinese Government Agency, the auditors of the Comptroller received copies of all invoices from which they could and did ascertain the exact amount which plaintiff collected from the buyer for both the price of the flour and for carrying charges.

15. As shipments of flour were made from time to time, plaintiff's managing agent prepared and submitted to the Comptroller's field auditors the documents containing the information required by sec. 8 of the Marketing Agreement (finding 5), and Exhibit C (finding 6). Two printed forms were required to be prepared and submitted by plaintiff for each shipment made by plaintiff's members on the purchaser's call. The first form was entitled "Public Voucher—Emergency Wheat Export Program" and showed the purchase price of wheat to be ground into flour, the net sales price of flour computed as specified in the Marketing Agreement, and the difference between the first two items, which was the amount due plaintiff by the Secretary of Agriculture. The second form, which accompanied the first, was entitled "Sales Price on Sales of Flour (in Terms of Wheat) for Export" and it set forth in item 3 the "Sales price per barrel (f. a. s. price)" of the flour, the deductions specified and called for in "Exhibit C" of the Marketing Agreement, and the net sales price. Item 3 of this second form required a statement of sales (f. a. s.) price of the flour, which in the July 12 contract was $2.95. In filling out this item 3, plaintiff first included the total f. a. s. price of $2.95 received from the Chinese Government Agency and, also, the accrued ⅙-cent per barrel per day carrying charges in a lump sum. At that time plaintiff's officer, who was handling the matter, discussed this with three of the field auditors of the Comptroller of the Department of Agriculture who advised that the matter should be so reported and that plaintiff would be paid the ⅙-cent per barrel carrying charges when the contracts had been completed. The method which plaintiff used in the instances now under consideration in connection with the four sales contracts with the Chinese Government, in reporting the required information for administration purposes, was in keeping with the custom that had grown out of prior transactions (not involving these carrying charges) between plaintiff and the Comptroller of the Department of Agriculture, wherein plaintiff was required by the Comptroller to show the entire amount received for flour from the buyer. When the first forms, above-mentioned, were sent in, the Comptroller of the Department of Agriculture returned the

papers to plaintiff with the request that the amount received from the Chinese Government Agency be broken down so as to show in printed item 3 of the second form the "sales price per barrel (f. a. s. price)" of the flour ($2.95 in the July 12 contract) and, under another line, to be typed in, the amount received as the ⅙¢ per bbl. carrying charges. Plaintiff was requested by the Comptroller to designate the latter amount on the form as "Plus amount received in excess of contract base price."

16. In compliance with the above-mentioned request of the Comptroller, plaintiff corrected and resubmitted the documents, copies of which are in evidence as defendant's exhibit 1 and are made a part hereof by reference. The net sales price of flour was thus arrived at on these documents in the manner specifically provided for in exhibit "C" of the Marketing Agreement in each instance, and the carrying charges collected from the Chinese Government for delay in acceptance at the time specified in its contracts with plaintiff were added to the sales price. This had the effect of reducing the amount due plaintiff by the amount of such carrying charges.

17. It is now the contention of counsel for defendant that the flat conversion charge of 50 cents per barrel, authorized by exhibit "C" of the Marketing Agreement (finding 5), is the only carrying charge which plaintiff was and is entitled to receive in determining the amount to be paid by the Secretary of Agriculture as the difference between the purchase price of the wheat and the sales price of flour under the terms of the Marketing Agreement, and that the carrying charges of ⅙¢ per barrel per day, for delayed acceptance of the flour by the purchaser, inured to the benefit of the Government and operated to reduce the amount otherwise payable to plaintiff by the Government under the terms of the Marketing Agreement.

18. The manner in which plaintiff submitted the vouchers, consisting of the two forms above-mentioned, particularly as to the addition of the total of the ⅙¢ per barrel per day carrying charges actually collected from the buyer to the sales price of the flour, had the effect of reducing the amount shown on all the vouchers to be due plaintiff under the terms of the Marketing Agreement by $37,353.38.

19. At the time the above-mentioned documents were prepared and submitted by plaintiff and received by the Government, plaintiff asserted its right under the terms of the Marketing Agreement and the sales contracts with the Chinese Government Agency to exclude from the sales price of the flour the ⅙¢ per barrel carrying charges in determining the amount of the sales price under the terms of the Marketing Agreement for the purpose of fixing the amount to be paid to plaintiff thereunder as the difference between the purchase price of wheat and the net sales price of flour, and the Comptroller's field auditors knew at the time that plaintiff intended at the proper time, when the contracts had been completed, to make a claim for such adjustment on account of the carrying charges at the rate of ⅙¢ per barrel per day, as provided for in the selling instructions and the contract with the Chinese Government Agency.

20. Plaintiff believed at the time the above-mentioned documents were prepared that it was necessary to submit the papers in the manner stated in order to collect the difference between the purchase price of the wheat and the net sales price of the flour, exclusive of that part of the carrying charges collected from the Chinese Government Agency of ⅙¢ per barrel, which plaintiff now claims, and to submit a claim for adjustment to arrive at the correct net sales price of the flour for the purpose of payments to be made by the Government on account of the difference between said purchase price of wheat and the net sales price of flour. In this belief plaintiff was correct, and this was in accordance with the understanding of defendant's field auditors.

21. Plaintiff did not at any time waive its claim for this adjustment and did not acquiesce in the finality of payments made to it by the Government from time to time on the basis of the documents submitted, as above-mentioned, which included the ⅙¢ per barrel carrying charges in the sales price of the flour. Such a claim was filed, as hereinafter mentioned.

22. On the basis of the documents prepared and submitted, as hereinabove mentioned, the defendant paid plaintiff from time to time the difference between the purchase price of the wheat and the net sales price of the flour as that dif-

ference was reflected in the documents prepared and submitted by plaintiff in the manner described in the previous findings. The vouchers were certified for payment between September 19 and December 27, 1934.

23. Thereafter, and for the reasons set forth in par. 7 of the petition herein, the members of plaintiff Association computed the amount of carrying charges on flour shipped to the Chinese Government Agency on the basis of 1/6-cent per barrel per day from October 1, 1934, to the dates of the respective shipments on orders of the Chinese Government, and forwarded this information to plaintiff's managing agent. The total amount of carrying charges thus computed by plaintiff was $12,172.94. Thereupon plaintiff filed a claim on April 9, 1935, for that amount (plaintiff's exhibit 5) with the Secretary of Agriculture.

24. Plaintiff's claim of April 9, 1935, for adjustment of the previous payments, through the exclusion of the 1/6-cent per barrel per day carrying charge from the amount to be used under the terms of the Marketing Agreement as the net sales price, and for payment of the additional amount of $12,172.94, representing the deficiency in the previous payments of the difference between the purchase price of wheat and the net sales price of flour, as intended by the Marketing Agreement, was referred by the Director of Finance of the Department of Agriculture to the Solicitor of the Agricultural Adjustment Administration for an opinion as to whether on the facts and under the terms of the Marketing Agreement, particularly sec. 8 and item 3 of exhibit "C" of the Agreement, the Secretary of Agriculture might legally make payment of the amount claimed for the difference between the sales price of wheat and the net sales price of flour determined on the basis of exclusion from such net sales price of 1/6¢ per barrel carrying charges in question.

25. The Solicitor held in an opinion of June 8, 1935, to the administrator of the Agricultural Adjustment Administration, acting for the Secretary of Agriculture, which opinion is in evidence, that under the facts and the terms of the Marketing Agreement, as intended by the parties thereto, the carrying charge of 1/6¢ per barrel per day to cover the cost to plaintiff's members of carrying the flour after the contract

date for delivery to the buyer should not have been included as a part of the sales price of flour to the Chinese Government in determining the "net sales price" of the flour for the purpose of the payments called for by the Marketing Agreement, and that plaintiff's claim for $12,172.94 was therefore correct. However, the Solicitor concluded his opinion with the suggestion that, although for the reasons stated in the opinion the Secretary of Agriculture could and should adjust the accounts of the members of plaintiff Association in terms of their request and pursuant to the formula set forth in the Marketing Agreement, the matter was not altogether unquestionable and "the question might better be submitted to the Comptroller General for a definite ruling."

By letter of July 11, 1935, prepared by the Comptroller of the Department and signed by the Acting Secretary of Agriculture, plaintiff's claim was submitted to the Comptroller General "for an advance decision as to whether or not, under a marketing agreement for disposal of the North Pacific wheat surplus, payment may be made thereon."

26. The Comptroller General held that there was no legal basis for payment of the amount claimed by plaintiff for the reason that the only obligation of the United States in the matter was to pay the differential as provided for in the Marketing Agreement and that this had been done; that since the carrying charges of 1/6¢ per barrel per day for delay in acceptance by the purchaser, which were included as a part of the sales price in determining the differential, were paid by the Chinese Government to the plaintiff Association in accordance with the terms of the sales contracts, the amount of such carrying charges did become and properly was regarded as a part of the sales price. He further held that plaintiff Association having accepted payments of the differential computed on the basis of the documents submitted during performance, with full knowledge of all facts, was precluded from making further claim.

27. Upon being given a copy of the Comptroller's opinion plaintiff wrote the Secretary of Agriculture requesting him to have the claim reconsidered and to place it in line for payment, on the ground that the ruling of the Comptroller General was not in accordance with the facts and the terms of

the Marketing Agreement for the reason that in the instructions received from the Secretary the Association was directed to sell the flour at a certain price and that, after a certain date specified for delivery, carrying charges of 1/6¢ per barrel per day were to accrue for the benefit of sellers to reimburse them for the cost of carrying the flour, due to the purchaser's delay, and that it could not rightly be contended that the members of the Association, who invested their own capital in the wheat to make the flour, should be penalized for carrying the flour long beyond the expiration date of the contracts of sale due to delay of the buyer, who, in turn, paid for the delay. Plaintiff further pointed out to the Secretary that under the ruling of the Comptroller General the longer the purchaser delayed in accepting the flour after the date specified and agreed upon for delivery, the greater the benefit would be to the Agricultural Adjustment Administration, which was not intended by the Agricultural Marketing Agreement, and that instead of plaintiff's members being compensated or reimbursed by the purchaser for the expense resulting from the delay, they would suffer a loss under the Marketing Agreement to the extent of such carrying charges.

28. The Secretary thereupon directed that the matter of payment of the claim be discussed by his representatives with the Comptroller General's office with the view of obtaining authority to pay the same, and he also again submitted the matter to the Solicitor of the Department of Agriculture for an opinion in the light of the facts and the Comptroller General's opinion of August 24, 1935, and plaintiff's request for reconsideration. In a written opinion to the Secretary on December 18, 1935, which is in evidence, the Solicitor discussed the facts, the provisions of the Marketing Agreement, and the reasons given by the Comptroller General for his refusal to authorize payment, and held that plaintiff's claim was correct and legal and that it should be paid. Following this opinion representatives of the Secretary of Agriculture had a conference with the Comptroller General's representative in an effort to have the Comptroller change his decision and authorize payment. As a result the Comptroller General's office asked that the matter be again submitted for further consideration. This was done in a letter of the Sec-

retary of May 14, 1936, in which he asked the Comptroller General to reconsider his former opinion and authorize payment of the claim. In an opinion to the Secretary on August 5, 1936, the Comptroller refused to change his former opinion on the ground that the matter had been settled by payments previously made by including the ⅛¢ per barrel carrying charges in the sales price and that, such settlement having been without concealment, misrepresentation, or fraud, was binding upon the parties to the Marketing Agreement.

As a result of this refusal of the Comptroller General to authorize the Secretary to pay the amount claimed by plaintiff, no payment was made and this suit followed.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

On October 10, 1933, the Secretary of Agriculture and the plaintiff entered into an agreement pursuant to the provisions of sec. 8 (2) of the Agricultural Adjustment Act approved May 12, 1933, 48 Stat. 31, 34, known as "Marketing Agreement No. 14," for disposal of a North Pacific wheat surplus. The pertinent provisions of this Agreement are described in findings 2 to 6, inclusive.

Sec. 4 of the Agreement authorized the Secretary to give written instructions to plaintiff to contract for the purchase of wheat, which instructions might include the quality of the wheat to be purchased, the price to be paid therefor, and the terms of purchase. Sec. 5 provided for the giving of written instructions by the Secretary to plaintiff to sell in export trade any part of the wheat so purchased pursuant to sec. 4, in the form of wheat or flour, and that such written instructions might, in the discretion of the Secretary, include the amount of wheat or flour to be sold; the sales price at which such wheat or flour be sold; the terms of such proposed sale and shipment; the port or ports of destination of the wheat or flour to be sold, and the purchaser to whom such wheat or flour should be sold. Plaintiff and its members agreed to carry out and fulfill such instructions as might be given by the Secretary to the best of their ability. Sec. 7 provided for the furnishing to plaintiff by its members of

verified statements with respect to such sales on forms to be supplied by the Secretary, which statements should include the sales price for all the wheat and flour sold and the cost incurred in respect to the same in accordance with the schedules set forth in exhibits "B" and "C," constituting a part of the Marketing Agreement. Exhibit "B" was the schedule of costs of handling, shipping, storing, and other charges with respect to the wheat to be purchased and sold, including an item of "selling costs" to be included among the costs to be allowed in connection with each sale made pursuant to sec. 5. Exhibit "C" was a schedule of costs of the processing of wheat into flour, and the handling and packing of the same (see finding 6).

The term "Purchase Price" as used in the Marketing Agreement was defined to be the price provided for in the wheat contracts purchased pursuant to sec. 4 and paid, pursuant to the terms of such contracts, as provided in sec. 5 with adjustments as provided in exhibit "A" to the agreement.

The term "Sales Price" as used in the Agreement was defined to be the f. o. b. or f. a. s. price specified in the bids submitted in connection with any sale of wheat or flour made pursuant to sec. 5. The term "Net Sales Price" as used in the Agreement was defined to be the sales price less the costs incurred pursuant to the schedules set forth in exhibits "B" and "C" in connection with any wheat sold as wheat or flour.

Sec. 8 provided that plaintiff should, upon the sale of wheat or flour pursuant to sec. 5, present to the Secretary a verified statement, on forms to be supplied by the Secretary, showing the purchase price of wheat, the sales price, and the net sales price for such wheat or flour computed as provided in ex. "C"; and the Secretary agreed to pay the Association within a reasonable time of the receipt of such statement and other documents "which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof, an amount equal to the difference between the purchase price and the net sales price."

Exhibit "C" of the Agreement expressly prescribed the basis upon which the purchase price of the wheat should be calculated, and contained a schedule for the conversion of

flour prices to wheat prices f. o. b. track at mill terminal basis (finding 6).

Among the items included in exhibit "C" was item 3—"Deduct conversion charge of 50 cents per barrel to cover preparation and processing of wheat, packing, storage of flour, administration and fixed charges, and office selling expense."

During the period from July 12 to August 9, 1934, the Secretary of Agriculture, as set forth in finding 7, gave plaintiff from time to time instructions to sell a specified number of barrels of flour at a specified price per barrel. In addition to the statement of the price at which the flour was to be sold, these instructions contained a provision, of which the provision in the instructions given on July 12, 1934, is typical, as follows:

> Shipment—Buyer's call, July, 1934. If not loaded in July, carrying charges at the rate of 1/6¢ per bbl. per day to accrue to the seller after July 31, or the end of the strike if it is still in effect at that time.

The question presented in this case is whether the amount claimed by plaintiff which was collected by its members under the sales contracts as carrying charges for delay of the purchaser, in this instance the Chinese Government, to accept delivery and order shipment of the flour on dates as specified in the instructions issued, should be included in or excluded from the sales price in determining the difference between the purchase price of the wheat to be processed into flour and the net sales price of the flour as provided in secs. 7 and 8 of the Agreement and exhibits "B" and "C" thereof. Plaintiff collected under the sales contracts total carrying charges of $37,353.38. The inclusion of the total amount of carrying charges for delayed acceptance computed from the dates specified for delivery in determining the difference, or differential as it is called in the record, between the purchase price of wheat and the net sales price of flour, which was to be paid by the Secretary of Agriculture out of processing taxes, resulted in such difference being $37,353.38 less than the differential calculated and determined in accordance with the express provisions of the Agreement. However, plaintiff claimed and sues for only $12,172.94 on account of the inclusion of

such charges from September 30, 1934, to dates of delivery of the flour.

Plaintiff and the Secretary of Agriculture, as shown by the facts, were in agreement, upon conclusion of transactions between them under the Marketing Agreement, that these carrying charges of 1/6¢ per barrel, which were intended to compensate or reimburse plaintiff's members for the costs of carrying the flour beyond the dates specified for acceptance and delivery to the purchaser, did not under the terms of the Marketing Agreement and the intention of the parties, inure to the benefit of the Government and should be excluded from the "net sales price" of flour in calculating the difference between the purchase price of wheat and the net sales price of the flour for the purpose of payments to be made by the Secretary of Agriculture. The matter was submitted to the Comptroller General for an advance ruling before payment and the Comptroller refused to authorize the Secretary to so calculate the differentials in prices on the ground that there was no legal basis therefor in the Marketing Agreement.

We are of opinion that the interpretation of the Marketing Agreement and the instructions by the Secretary of Agriculture and plaintiff, who were the parties to the contract, was correct, and that the decision of the Comptroller General to the contrary was erroneous. There was no estoppel as a result of payments made on shipments from time to time on the basis of the vouchers and other forms prepared and submitted by plaintiff in accordance with instructions of the Comptroller of the Department of Agriculture and his field auditors, since the record conclusively shows that plaintiff and the Government's representatives understood at that time that plaintiff did not acquiesce in that method of calculating payments to be made by the Secretary of Agriculture, and would file a claim for adjustment in due course, which was done. The Secretary's Office did not consider or pass upon the matter until after the transactions with the Chinese Agency under the Marketing Agreement had been completed and the amount of the 1/6¢ per barrel per day carrying charges collectible by plaintiff's members under the contracts for the sale of flour had been determined.

The proof shows that the parties to the Marketing Agreement did not intend that the provisions and instructions from the Secretary of Agriculture to plaintiff to sell flour to the Chinese Government at a specified price per barrel, and to collect, in addition to such price, a carrying charge at the rate of ⅙¢ per barrel per day for delayed acceptance by the buyer, should be a modification of the provisions of the Marketing Agreement for the calculation or determination of the differential between the purchase price of the wheat and the net sales price of the flour. The Solicitors of the Agricultural Adjustment Administration and the Department of Agriculture so decided upon the facts and under the terms and conditions of the agreement.

The Solicitors in their opinions to the Administrator of the Agricultural Adjustment Administration and to the Secretary of Agriculture found that the carrying charges in question were not intended by the Secretary or the plaintiff Association or the Chinese Government to be considered as a part of the sales price of the flour within the meaning of the Marketing Agreement, but were designed and intended to offset the costs which would be incurred by plaintiff's members as a result of delay on the part of the purchaser of the flour to accept delivery and shipment thereof by the time fixed in each contract. They further found that the intention of the parties was that the carrying charges provided for in the contract for sale of flour should inure to the benefit of the seller members of plaintiff Association rather than to the United States, as the instructions issued by the Secretary expressly provided. They further found that the flat rate of fifty cents per barrel conversion charge provided in item (3) of exhibit "C" (finding 6) was designed and intended to cover only such expenses as were incidental to the normal and usual carrying period of conversion of wheat into flour, rather than to an unusual and extended period due to delay on the part of the purchaser of the flour to accept prompt delivery and order shipment.

They further found and held that the reason for the instructions to plaintiff to collect from the purchaser the ⅙¢ per barrel per day carrying charges for delay beyond the

period necessary for normal conversion and delivery was because the fifty cents a barrel, normal conversion charge, was inadequate to reimburse members for carrying charges incident to long carrying periods. They held and found that the purpose of the Marketing Agreement was to dispose of as speedily as possible the surplus 1932 and 1933 wheat crops, and that the underlying policy of the Marketing Agreement and the intention of the parties thereto were that plaintiff should be paid the difference between the purchase and sales prices as provided therein and that no loss should be suffered by members of plaintiff Association in executing its terms. They also found that it could not be implied on the facts or under the Marketing Agreement that the intention of the Secretary in issuing instructions with reference to the 1/6¢ per barrel carrying charge, or of plaintiff Association in incorporating that provision in the sales contracts, that such carrying charges should be used to reduce or offset any payments that might be made by the Secretary under the Marketing Agreement out of the proceeds from processing taxes.

In view of the facts established by the record, the provisions of the Marketing Agreement, and the findings and conclusions of the Office of the Secretary of Agriculture, plaintiff is entitled to recover the amount of $12,172.94.

Counsel for defendant assert that except as to the amount of $498.15 the claim is barred by the statute of limitation, but this claim is not supported by the record.

As appears from findings 9 and 13 plaintiff's members collected from the Chinese Government Agency carrying charges at the rate provided for in the selling instructions issued by the Secretary and the sales contracts in the total amount of $37,353.38, but, as set forth in findings 12 and 23 the amount of such carrying charges accruing on and after October 1, 1934, to the dates on which the flour was accepted for shipment by the Chinese Government Agency, was $12,172.94, which is the amount claimed in the petition filed herein.

In the first brief filed in the case by plaintiff on March 15, 1943, plaintiff asked that the court render judgment in its favor for the full amount of carrying charges of $37,353.38,

but in view of the allegations of the petition and the facts with reference to the manner in which the claim was made to the Secretary and the extent of the claim for adjustment, we are of opinion that plaintiff is not entitled to recover any amount in excess of $12,172.94 above mentioned. Any attempt to amend the petition so as to claim this larger amount would have stated a new cause of action to that extent, and such an amendment was barred by the statute of limitation of six years at the time plaintiff indicated, in said brief, that it should be allowed to amend its claim.

Paragraph 7 of the petition set forth that it was contemplated by plaintiff and the Chinese Government Agency that under the sales contracts the flour purchased thereunder would be delivered to the purchaser for shipment abroad not later than September 30, 1934, and that the Chinese Government Agency agreed to accept delivery on or before that date; that, nevertheless, the purchaser did not accept delivery of all the flour until after that date, and 216,323 barrels were delivered, on the order of the purchaser, between October 1 and December 15, 1934: that because the purchaser did not accept delivery of the flour in accordance with the terms of its Agreement, plaintiff, through its associates and members, was obliged to incur expense at the rate of 1/6th of one cent a barrel per day for carrying charges on the flour from and after September 30 up to the dates on which the various shipments were made.

The petition further alleged that in order to reimburse itself and its members for the amount of expense so incurred for carrying charges, plaintiff demanded of and received from the Chinese Government Agency the aggregate amount of said carrying charges amounting to $12,172.94 in addition to the purchase price of the flour.

It seems clear that any amendment of these allegations of the petition so as to claim $25,180.44 additional carrying charges, computed strictly in accordance with the contracts made by plaintiff with the Chinese Government Agency, from July 31 and August 31, 1934, respectively, as provided in the four purchase contracts mentioned in finding 10, would constitute a statement of a new cause of action for the addi-

tional amount. Moreover, no amendment of the petition was ever filed.

Judgment will be entered in favor of plaintiff for $12,172.94. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge; and* WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ON DEFENDANT'S MOTION FOR NEW TRIAL
(Decided June 4, 1945)

Mr. Fred B. Rhodes and *Mr. William E. Carey, Jr.*, for plaintiff.

Mr. W. A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

LITTLETON, *Judge*, delivered the opinion of the court:

Defendant's motion for a new trial is based upon the assertion that recovery of $11,674.79 of the amount of $12,172.94 claimed by plaintiff was barred by the statute of limitation of six years at the time the petition was filed herein, December 17, 1940. This claim is based entirely upon the dates on which the Comptroller of the Department of Agriculture made certain payments to plaintiff as certain shipments were made from time to time in performance of contracts with the Chinese Government Agency, as set forth in the findings heretofore made by the court. See findings 14 to 23, inclusive, published April 2, 1945.

Counsel for defendant contend in effect that each of these payments made by the officials of the Department of Agriculture on the documents described in the findings mentioned was final as to the time for institution of suit under the Marketing Agreement in respect thereof, and that any claim which plaintiff had on account of inclusion in the sales price of flour of the ⅛-cent per barrel carrying charge involved in such shipments finally accrued, for the purpose of the statute of limitation for bringing suit, at the time such payments were made. This was the contention previously made by defendant and denied by the court. The findings heretofore made show it was the intention of both parties to

the Marketing Agreement that under the directions given in connection with the Chinese Government contracts for flour these carrying charges should not enter into the determination of the differential payable under the Marketing Agreement computed in accordance with exhibits A, B, and C thereof. There had been no change in the Marketing Agreement under sec. 7 thereof, which provided that it might be changed only "by agreement between the Association and the Secretary." The findings and the evidence show that at the time the documents and vouchers referred to and relied upon by defendant were prepared, and when the payments were made thereunder by the Comptroller, all parties concerned understood and agreed that the matter of whether or not the carrying charge in question should enter into the determination of the amount payable under the Marketing Agreement, as the difference between the purchase price of the wheat and the net sales price of the flour, should be reserved and held in abeyance for later determination by the Secretary on a verified statement to be prepared and submitted by plaintiff to the Secretary when the contracts with the Chinese Government had been completed. Neither the Comptroller of the Department nor W. M. Clohessy, the authorized representative's secretary, purported to make a final decision as to this portion of the amount claimed by plaintiff to be due as the difference between the purchase price of the wheat and the sales price of the flour. Therefore, under the provisions of sec. 8 of the Marketing Agreement, this claim of the plaintiff did not accrue within the meaning of the statute of limitation for bringing suit until a reasonable time after plaintiff prepared and filed with the Secretary a verified statement and claim with respect thereto. Such a claim was filed by plaintiff within a reasonable time and within six years of institution of the suit, and the Secretary considered and allowed the claim within a reasonable time thereafter, on July 11, 1935.

Defendant's motion for a new trial is overruled. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this motion.

CENTRAL ENGINEERING AND CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 44604. Decided April 2, 1945]

On the Proofs

Government contract; allowance of payment for rock excavation at unit price in lump-sum contract.—Plaintiff entered into a contract with the Government for the construction of certain buildings on Big Moose Island, off the Coast of Maine. The contract was the Standard Government Form of Construction Contract. Bids were asked for and submitted on a lump-sum basis for each structure, certain alternate lump-sum bids, and a separate bid of unit prices under certain specified classifications, which unit prices were to be used in connection with increases or decreases in the lump-sum price through changes or unforeseen conditions and in connection with any work, the compensation for which was not included in the lump-sum bid, as provided by the contract, specifications or drawings. In the course of excavation ledge rock was encountered and excavated, for which contractor was allowed payment at the unit price for rock excavation under an order of the contracting officer, approved by the head of the department. The amount thus allowed, as for extra work, was disallowed, on final settlement, by the Comptroller General. It is *held* that plaintiff is entitled to recover, since paragraph 11 of the specifications shows that its intention was that the drawings would indicate the rock conditions to the extent that the contractor should include these conditions in the lump-sum bid called for in the Bid Form, and that rock conditions not so indicated which might be encountered would be paid for as an extra at the contract unit price called for in the bid.

Same; interpretation of contract by parties thereto before controversy arises is given great weight.—Where the contracting officer and the head of the department agreed with plaintiff's interpretation of the intent and meaning of the specifications and drawings, any ambiguity which might otherwise appear on the face of the documents is of no moment; the interpretation of a contract by the parties to the contract, before it becomes the subject of controversy, is deemed by the courts to be of great, if not controlling weight. *Baltimore* v. *Baltimore and Ohio Railroad Co.*, 10 Wall. 543; *Brooklyn Insurance Co. of New York* v. *Dutcher*, 95 U. S. 269; *Old Colony Trust Co.* v. *City of Omaha*, 230 U. S. 100; *Whitney* v. *Wyman*, 101 U. S. 392, 396; *George* v. *Tate*, 102 U. S. 564, 570; *North Pacific Emergency Export Association* v. *United States*, 95 C. Cls. 430, 448, 449.

Same; evidence in letter of contracting officer approving contractor's claim.—Aside from the mutual interpretation of the instant contract as evidenced by the work order for rock excavation, there is other direct evidence which shows such intent in the letter written by the contracting officer to the contractor in response to contractor's claim for payment as an "extra," approving such claim.

Same; custom in construction industry as to rock excavation.—It is one of the recognized customs in the construction industry, as shown by the evidence in the instant case, to base specifications and bids, with reference to excavations, on earth excavation, which is easy to calculate, leaving the matter of payment for such excavation of rock as may be necessary to adjustment on the basis of separate unit prices, or by some other method, and the Government frequently adopts this practice. *Dewey Schmoll et al.* v. *United States*, 93 C. Cls. 572, 575; *Union Engineering Co., Ltd.* v. *United States*, 97 C. Cls. 424, 429, 430; *John M. Whelan & Sons Inc.* v. *United States*, 98 C. Cls. 601, 617; *Rego Building Corp.* v. *United States*, 99 C. Cls. 445, 452, 459.

Same; Standard "examination of site provision" not controlling in instant case.—In view of the specific provisions of the specifications and the interpretation of the parties, the Standard "Examination of the site" provision, contained in paragraph 16 of the General Conditions of the Specifications of the contract in suit, is not controlling in the instant case.

Same; no double payment for rock excavation; deduction for equal amount of earth excavation in estimates.—The allowance of payment for the 507.9 cubic yards of rock excavation as an extra does not result in a double payment to plaintiff for "excavation," since plaintiff based its bid on earth and gravel excavation, but as this rock excavation displaced an equal amount of earth excavation deduction therefor is made in the amount of the judgment entered.

The Reporter's statement of the case:

Mr. Theodore B. Benson, for plaintiff.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Mr. Brice Toole and *Mr. Milton Cramer* were on the brief.

Plaintiff sues under a contract with defendant to recover $3,555.30 allowed for extra work under art. 5 by defendant's contracting officer and the head of the department, on the basis of the unit-price provision of the contract, as compensation for the excavation by plaintiff of 507.9 cubic

yards of rock, which excavation it held was not, under the terms of the contract provisions, included in the lump-sum bids and contract price.

The Comptroller General refused to authorize payment of the amount so allowed in addition to the lump-sum contract price on the ground that the contract, as interpreted by him, did not authorize such allowance.

The question presented is therefore whether, under the facts as established by the evidence, the contracting officer and the head of the department, or the Comptroller General, properly interpreted the contract.

Plaintiff relies upon the interpretation of the contract by it and the contracting officer, and counsel for defendant seek to sustain the decision of the Comptroller General to the contrary.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a Rhode Island corporation with principal office at Pawtucket, was the successful bidder under defendant's invitation for bids, specifications, and drawings for the construction at Schoodic Point, Maine, of five certain naval radio buildings complete, as called for in the specifications and drawings.

The invitation for bids and the specifications, as hereinafter set forth, called for the submission of lump-sum bids for each structure, certain alternate lump-sum bids, and a separate bid of unit prices under certain specified classifications, which unit prices were to be used in connection with increases or decreases in the lump-sum price through changes, unforeseen conditions, and in connection with any work, the compensation for which the contract, specifications, and drawings did not contemplate or provide should be included in the lump-sum bid.

Plaintiff's lump-sum bids totaling $123,760 and its bid of unit prices of sixty cents per cubic yard under the heading "Earth Excavation" and $7.00 per cubic yard under the heading "Rock Excavation" were accepted, and a contract, dated July 19, 1933, was entered into with the Department of the Interior, National Park Service. The contracting

officer signing the contract for defendant was Oliver G. Taylor, Chief, Eastern Division, Branch of Engineering. Upon being executed the contract was approved August 1, 1933, by the Secretary of the Interior acting through Oscar L. Chapman, assistant secretary.

2. ART. 1 of the contract provided as follows:

> *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for
>
> (*a*) Five Naval Radio Station Buildings, having plumbing, heating and electrical systems; all complete and ready for use,—
>
> (b) A complete water supply system, including pump, motor, and pipe lines from Government well to Apartment Building and Intercept Building,—
>
> (c) Electric service lines to the five Naval Radio Station Buildings and the two Radio Towers from the Main Panel Board in the Power House—
>
> for the consideration of One hundred twenty-three thousand seven hundred sixty dollars ($123,760.00) in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows:
>
> Specifications No. 160.
>
> Drawings Nos. 1 to 31, inclusive (Revised June 28, 1933) and Nos. 32 to 37, inclusive.
>
> The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within three hundred and sixty-five (365) calendar days from that date.

The contract was the Standard Construction Contract, Form No. 23. Art. 2 provided that "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern."

ART. 3 was the usual provision authorizing changes in the drawings or specifications and calling for an equitable adjustment in the amount due under the contract, if such changes should be made.

ART. 4 was the standard provision with reference to the encountering by the contractor or the discovery by the Gov-

ernment, during prosecution of the work, of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications," and calling for an equitable adjustment if the contracting officer should find such differing conditions to exist.

ART. 5 was the usual provision concerning "extras" and provided that "Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

ART. 15 provided for final determination by the contracting officer of all disputes concerning questions of fact arising under the contract, subject to appeal to the head of the department.

3. The five buildings whose construction was required under this contract were an apartment building, a powerhouse, a pump house, an intercept building, and a radio compass station. The buildings, except the apartment building and power house, were located at distances of several hundred feet from each other, the entire group being situated on Big Moose Island near the southern end of Schoodic Peninsula, Hancock County, Maine. To the south, southeast, and southwest the island's coastline consists mostly of rock formations. These three coastlines are shown in three photographs, defendant's exhibits E, E-1, and E-2 attached to and forming a part of a stipulation filed, which exhibits are made a part of this finding by reference.

The terrain from the coastline has an upward slope for a considerable distance and from a short distance from the coastline the land is entirely covered by a heavy growth of spruce woods, and only at some spots within the wooded area are there outcroppings of rock. However, outcroppings of ledge rock are common but not uniform on Big Moose Island, and fragments of ledge rock were exposed on the surface of the ground at or near the site of the Radio Station Apartment Building.

The Apartment Building had a basement and was the largest building in the group of buildings or structures called for, and the principal amount of excavation indicated on the drawings and in the specifications related to this

building and the sewer trench leading from this building to manhole no. 1. All other trench excavation was to be done by the Government, including necessary excavation for the sewer line or trench from manhole no. 1 to the shore of Arey Cove, a distance of approximately 700 feet. The appropriate drawings indicated and showed with respect to each structure to be erected by plaintiff the extent and depths of excavations therefor, but the specific or principal provisions concerning the matter of rock excavation were set forth in paragraphs numbered 10 and 11 of the apartment building specifications. The excavation provisions of the specifications as to the other four structures were general and, by a note, general reference was made to the earlier apartment building specifications.

4. The site or location of the apartment building was 750 feet from the coastline at the mouth of Arey Cove, southeast of the building. The site of the powerhouse was near the southeast corner of this building and the line of the sewer trench ran between these two structures to the coastline. The apartment building was I-shaped in northeast and southwest directions from its center. The site of the radio compass station was 500 feet northwest of the western end of the apartment building; the site of the intercept building was 700 feet north, northwest of the apartment building; the site of the pump house was 1,800 feet north, northeast of the apartment building.

Before preparing the estimate of cost of the work and submitting the bids for each of the buildings and systems, plaintiff's president went to the site where the structures were to be erected, found the site where the apartment building was to be constructed, which had been partially cleared by defendant, and made an examination of that site and looked over the surrounding area, as hereinafter set forth.

5. Before preparing the drawings defendant's representatives had made examinations of the area where the structures were to be located and erected, and had dug five or more test pits at the sites of the apartment building, the powerhouse, and the upper portion of the trench for the sewer line. These test pits were about two or three feet

deep. The information or data obtained from these examinations and test pits was considered and used in connection with the preparation of the drawings for foundations and excavations.

6. Paragraph 6 (a) of the general conditions of the specifications, entitled "Omissions and Descriptions," provided as follows:

> The omission from the contract, including the drawings, specification, or other papers attached thereto and forming a part thereof, or the misdescription therein of any details of work, the proper performance of which is evidently necessary to carry out fully the general intention expressed in the specification, shall not operate to release the contractor from performing such work, but it shall be fully and properly performed in the same manner as if fully and correctly described, indicated, and required in and by the contract, and without expense to the Government in addition to the contracting price. This shall not be interpreted to cover additions, substitutions, improvements or other changes; these are otherwise provided for.

Subsection (c) provided in part that "except where specifically provided to the contrary, the Standard Government Form of Contract is to govern in case of any discrepancy or inconsistency between it and the other Contract Documents."

Paragraph 16 of the general conditions of the specifications, entitled "Examination of Site," which was a standard provision, was as follows:

> Information respecting the site given in the drawings and specifications and the accompanying plot plans, has been obtained by Government representatives and is believed to be reasonably correct, but the Government does not warrant either its completeness or accuracy. Intending bidders are expected to examine the site and acquaint themselves with working conditions.

No information or data sheet, or drawing, was supplied.

Paragraph 21 of the General Conditions provided that the Government would build suitable roads for hauling materials to the sites of the structures called for, and that the contractor would begin work within ten days after notice that such roads were available for use.

Paragraph 29 of the General Conditions provided that

> No changes shall be made in this contract, except by written agreement by and between the parties thereto, stating the work to be performed or omitted, the extension or reduction of the contract time of completion, and the addition to or deduction from the amount to be paid for the performance of the contract. This supplemental agreement shall be entered into prior to the performance of any work involved in the change.

No changes within the meaning of this provision were made.

Paragraph 37 (c) of the General Conditions provided that "The Government will excavate and backfill all trenches outside of buildings, excepting such trenches as are required for sewer and drainage lines in the vicinity of the Apartment Building leading as far as manhole number one."

Paragraph 41 (a) and (b) of the General Conditions, entitled "Unit Prices," was as follows:

> (a) The Contractor shall submit with his bid the following unit prices for use upon any or all work:
>
> a. Excavation (earth) in bulk per cu. yd.
> b. Excavation of rock and boulders over ½ cu. yd. per cu. yd.
> c. Concrete in piers and walls, per cu. yd.
> d. Reinforcement rods per pound.
> e. Concrete wall forms per sq. ft.
> f. Concrete pier forms per sq. ft.
>
> (b) Such prices will be used as a basis for correlation with articles 3 and 4 of the Standard Government Form of Contract.

7. The specification provisions relating specifically to the apartment building contained under the "Heading of Excavation and Masonry" the note that "All work included under this heading shall be subject to the General Conditions of the Contract, * * * and the Contractor is required to refer especially thereto." A like "note" was contained in the specifications relating to each of the other structures.

Paragraph 1 of the Apartment Building Specifications, and the same paragraph relating to each of the other structures, provided, under the heading "Scope of the Work," as follows:

The work under this heading shall consist of furnishing all labor and materials and appliances for the complete execution of all work of every description mentioned herein, and any other labor and materials as may be reasonably inferred as needed to make the work under this heading complete.

The specifications relating to each structure, other than the apartment building, contained a "note" that "All workmanship, materials and their installation, wherever specified or shown in this building, shall be as described in the Specification of the Apartment Building, unless otherwise specifically mentioned hereinafter."

Paragraph 2 of the Apartment Building Specifications provided that "work omitted" consisted of

(a) All trenching, including backfilling, for the installation of all electric, telephone, water and sewage lines outside the buildings, excepting sewage and drainage trenches leading from the Apartment Building as far as and including manhole number one.

(b) All finished grading will be done by the Government.

8. The specifications relating to the apartment building under the heading of "Excavation and Masonry" and under the sub-heading of "Excavation" provided in paragraphs 9 to 13, inclusive, as follows:

9. Remove all vegetable matter (top soil) from the area occupied by the building and stack at the site where directed.
10. Remove all rock to depths as shown, in all cases at least 6 inches below the existing grade of ledge rock, to provide level, clean beds to support the foundations, and 5 inches below finished floors of the Basement.
11. In case the actual conditions of rock differ from those shown on the drawings, an adjustment in the contract price will be made, based on a unit price basis to be submitted with the estimate.
12. This Contractor shall excavate to the dimensions and depths indicated or necessary for all foundation walls, interior bearing walls, pier footings and trenches for interior piping as shown on the plumbing Drawings.
13. Excavate for the footing drains shown along the North East side.

Paragraphs 14 and 15 relating to "Footing Drains" and the specifications in paragraphs 16 and 17 provided, under the heading "Excavation and Masonry" and the sub-headings "Superfluous Earth" and "Top Soil," respectively, as follows:

16. This Contractor shall spread or dump all superfluous excavated material around the immediate vicinity of the building at a distance not greater than 80 feet as directed.

17. Material from the excavation suitable for topsoil shall be deposited in piles separate from the other excavated material. Piles of topsoil shall be located so that the material can be readily used for finished surface grading and shall be protected and maintained until the completion of the General Contract.

Paragraph 26 under the general heading "Excavation and Masonry" and sub-heading "Materials" provided as follows:

Stone for exterior of outside walls shall be local field stone, random size and shape, generally "one man" stones with weathered faces exposed wherever practicable. Spalls of Pinnors may be used quite freely. Broken or freshly quarried faces may be exposed except in the case of white or very light gray stone, which may be used for backing. The Contractor may obtain a large amount, if not all, of the wall stone on or near the site from rock excavation for buildings and trenches, the existing stone pile near the Pump House site and stone lying along the beach, particularly to the South East of the Apartment Building site. In this last case he is not to take all the stone from any one location but is to select it more or less evenly along the entire length of the beach, as directed by the Officer in Charge. If enough stone is not obtainable from the above sources, he may, himself, quarry the balance from surface ledges on Schoodic Point or nearby, as directed by the Officer in Charge, or obtain it from local quarries or elsewhere. All expense for the collection, transportation, blasting and any other necessary protection involved is to be borne by the Contractor.

9. The only provision in the specification for the power house with reference to "Excavation" was paragraph numbered 2 under that heading which provided: "Excavate to the required depths, as shown on drawings." The identical

provision under the same heading was contained in paragraph 2 of the specifications relating to the pump house. Paragraph 2 of the specifications relating to the intercept building under the heading "Excavation" provided: "Excavate to the required depths and dimensions as shown on drawings, for footings, walls, piers, Boiler Room and exterior steps." Par. 2 of the specifications relating to the radio compass station under "Excavation" provided: "Remove the top soil and excavate the rock to dimensions and depths as shown." Par. 7 under "Masonry" provided that "Stone blasted from the excavation may be used as backing stone."

10. The specifications under the heading "Plumbing" provided in par. 1 that "The work consists of (a) an outside sewer and drainage system, as far as outlet to manhole No. 1 (the sewer between manhole No. 1 and Arey Cove and the sewer between the Intercept Building and Manhole No. 1 is not a part of this contract), downspout connections and manhole; (b) an outside water system including * * * pump and water line connections from pump to Apartment and Intercept buildings * * *; (c) a complete plumbing system for the Apartment Building and the Intercept Building, including where indicated sewer, soil, drain waste, vent, and hot and cold water piping, cold water storage tank, air compressor, plumbing fixtures and accessories, * * *. (Earthwork required in connection with the plumbing is specified under other sections.) The Government will provide the earthwork for the water main from the pump house to the Apartment Building and Intercept Building and the contractor will furnish and install the water main, * * *."

Par. 5 (a) relating to "Water piping buried in the ground" provided that "The two 2-inch lines leading from the Cold Water Storage Tank to the outside of the building shall be carried in trenches 3½ feet deep or to the depth of top of ledge rock, and backfilled. This applies to the portion under the building as well as outside."

Par. 1 of the specifications relating to the "Heating System: For the Apartment Building and Power House" set forth the "general requirements" as to this system and

contained the statement that "Earthwork required in connection with the heating system is specified elsewhere herein."

11. The provisions of the specifications set forth in the preceding findings were all the provisions therein having any relation to excavation.

12. The defendant's drawings which accompanied the specifications, among which were certain excavation drawings, and which were a part of the contract, have not been filed as exhibits in the case, but the parties stipulate as facts that the drawings show that the depths of the excavations below the natural surface of the ground, which were required for the various buildings and the sewer trenches under said contract, were as follows:

Apartment building, from 6 inches to 5½ feet.
Intercept building, 3½ feet.
Power house, 1½ feet.
Pump house, 1½ feet.
Radio compass station, 1 foot to 3 feet.
Sewer trench adjacent to apartment building, 4 feet to 6 feet.
Sewer trench from apartment to Arey Cove, 3 feet to 14 feet.

The foundation drawing, sheet 21, for the apartment building contained the notation with reference to the bases of the foundation columns for this building: "To be carried to bedrock or at contractor's option he may use spread footings."

13. Under the terms of the specifications, hereinbefore set forth, the contractor was not required to do certain of the above excavation, particularly that for the "sewer trench from apartment [manhole no. 1] to Arey Cove."

14. The parties further stipulated that the contract drawings did not include a sheet of borings or test pit data, nor any other sheet reflecting the conditions of the subsurface at the site of the work, and that they did not show or attempt to show that rock, earth, gravel or any other material existed below the surface of the ground at the site of the work.

15. Defendant's invitation for bids was issued June 1, 1933, and the standard bid form, entirely written by defendant with blank spaces for prices, provided that the

bidder proposed to furnish all labor and material and perform all work required for the construction of the five buildings and systems, mentioned in finding 2, "in strict accordance with the specifications, schedules, and drawings, for the consideration of prices submitted on attached 'Bid Schedule.'" This bid schedule called for lump-sum bids for each building "complete," and for certain alternate bids as to each building under the alternate provisions of the specifications; the water supply system complete, and all service electric lines outside of buildings. Following this, the bid schedule called for bids of "Unit Prices" for the following:

Excavation (earth) in bulk; per cu. yd.
Excavation of rock and boulders over ½ cu. yd.; per cu. yd.
Concrete in piers and walls; per cu. yd.
Reinforcement rods; per pound.
Concrete wall forms; per sq. ft.
Concrete pier forms; per sq. ft.

16. Plaintiff, after a visit to the site as hereinafter mentioned, submitted bids as called for, among which were unit-price bids of $0.60 per cu. yd. for excavation of earth and $7.00 for excavation of rock.

Prior to submission of its bids Howard C. Fisher, president and treasurer of plaintiff corporation, examined the site of the proposed buildings with reference, among other things, to the construction of the buildings and their foundations. The site was covered at that time with very thick spruce woods, but a partial clearing had been made at the site of the apartment building.

Fisher found four or five test holes, or pits, that had been dug by defendant. He examined each hole carefully, prodded into each with a pole and found loose stones and gravel at the bottom of each hole, with perhaps two or three inches of water. The test holes were about two or three feet deep and the workmen present told Fisher that they were at the site of the apartment building.

At the time of his visit to the site, and before the bids were submitted, Fisher also examined the specifications and drawings, and found no note, tracing, nor mention of rock

on any of the drawings, except that on one sheet relating to the radio compass building there was a small detail which showed a method of anchoring to ledge rock; and on a drawing relating to the apartment building there was a note that the columns were to be carried to bed rock or, at the contractor's option, he might use spread footings.

17. Fisher knew when the bids of plaintiff were prepared and submitted that under the specifications and drawings plaintiff would be required to perform all excavation work called for, and not excluded by the specifications, to the extent and to the depths shown in each instance on the drawings; but in reliance upon the specifications, particularly pars. 10 to 13, inclusive, and the drawings, as he interpreted them, he included in his lump-sum bids amounts which totaled $1,500 on the basis of earth excavation for all excavations shown and required of the contractor, in the belief that if rock was encountered and excavated to the lines and dimensions shown the plaintiff would be paid therefor at the unit-price bid for excavation of rock. The basis for the interpretation and belief of plaintiff was the language of pars. numbered 9 to 13, inclusive (finding 8), of the specifications and the absence of any note, tracing, or mention on any drawing as to conditions of rock in connection with the excavation shown thereon. In the construction industry it is one of the recognized practices to solicit bids involving excavations on the basis of earth excavation, leaving the matter of payment for excavation of such rock as may be encountered and necessary to be removed to adjustment on the basis of unit-bid prices for rock. Plaintiff's president was familiar with this rule and so interpreted the defendant's specifications and drawings. The contracting officer and the head of the department likewise so interpreted the specifications and drawings, as hereinafter set forth.

18. After work was commenced and while the work of making excavations for the foundations, etc., for the various structures and installations was proceeding, plaintiff encountered ledge rock on August 15, 1933, above the elevations or depths of the excavations called for and shown on the drawings. On August 28, after more information with

reference to this condition of rock had been obtained, plaintiff wrote and forwarded to the contracting officer a letter, the material portion of which was as follows:

> As you probably know, we have encountered rock in our excavation which was not shown on the drawings. That being the case, there will be an "extra" for this item. As I understand it, the rock is being surveyed before the blasting is done and will be surveyed after it is removed. We will then have the actual quantities taken out. Should I ask for an "extra" for this item at this time or when the actual quantities are available?

19. After consideration of plaintiff's letter making claim for excavation of rock as an "extra" the acting contracting officer, C. D. Monteith, wrote plaintiff as follows:

> I have your letter of August 28 advising that you have encountered rock in the excavation for foundations.
>
> This matter of rock excavation is covered in Articles 10 and 11, page 14, of the Specifications, under the heading of Excavation. In accordance with Article 10 you are required to "remove all rock to depths as shown" and "in all cases at least 6″ below the existing grade of ledge rock." The limit of excavation as shown on the elevations of the buildings therefore indicates in line with this article, the rock conditions, referred to in Article 11, that were expected to be encountered. When the plans were drawn the depths of foundations were determined by the elevation of rock as shown by a series of test pits. These pits were afterwards left uncovered with the rock exposed to serve as a guide to bidders in calculating the amount of rock excavation that would be necessary.
>
> If you should be required to excavate rock to greater depths than indicated in the drawing you would then, in accordance with the provisions of Article 11, be entitled to extra payment on the basis of Item 29 of your bid schedule.

20. A substantial portion of the rock had been removed by September or October 1933, and practically all of the total quantity of 507.9 cubic yards of rock herein involved was removed prior to February 3, 1934.

21. In a report dated October 4, 1933, to the contracting officer, defendant's superintendent of construction, J. R. Thrower, stated with reference to rock excavation, in part, as follows:

The contractors' viewpoint is that the Specification (par. 10) calls for the removal of rock to depths as shown. Naturally, this means to the bottom of footings or below basement floor slabs.

Par. 11, says that if actual conditions of rock differ from those shown on drawings, an adjustment in the price will be made, whereas no rock is shown on either plans or elevations. They claim the test pits did not show the true conditions in that some were full of water and others showed a gravel bottom. Manhole No. 1, and the trench leading to it, had no indication of sub-surface conditions.

I would like to know your attitude, so that I could advise the Contractors. In the meantime, I am checking on the quantities. Later on there will be excavation for the oil tank. I have in mind to get some of Mr. Hadley's crew to make some test holes for it, in hopes of striking a spot free of rock."

22. October 11, the contracting officer wrote Thrower asking him for further comments with reference to the specifications and drawings concerning the matter of excavation of rock within the excavation lines and dimensions shown on the drawings, and on November 17, 1933, Thrower replied in a letter to the contracting officer as follows:

In your letter of Oct. 11, you requested my comments on the rock excavation discussed by Mr. Monteith in a letter to the Central Engineering & Construction Co. of Sept. 1, 1933.

The test pits, as a guide to bidders, and to serve the purpose of showing sub-surface conditions, cannot be construed as guides for rock calculations necessary. There is no question but what all bidders were aware of rock conditions after a visit to the site and knew that rock would be encountered. The question is whether rock excavation is to be included as part of the contract price, or as an extra. The specifications assume rock and its removal.

The Contractor would assume rock excavation, as an extra, for the following reasons:

1. The unit prices asked for on the Bid Schedule.
2. The well established custom of Architects and Engineers in separating rock excavation from the rest of the contract.
3. Par. 11, page 14, the first part of which conflicts with the plans, the second part reassuring the Con-

tractor of payment in case rock was found, other than shown on plans.

4. The failure of the plans to show evidence of any rock. An estimator, without a knowledge of the site, and taking quantities from the plans and specifications, would not assume any rock whatever, as none was shown on the plans except on the Radio Compass Station, where the detail wall section showed the wall anchors into rock. But the depth of rock is not given. Therefore, in case rock as (sic) [is] later encountered, par. 11, page 14, would protect his assumption.

My interpretation is that the Specifications were intended to include all rock excavation within the contract price, based on:

1. Par. 10, page 14.
2. Par. 11, page 14.
3. Examination of site, including test holes.

However, the plans were not coordinated with par. 11, page 14, and are faulty in that they do not show the rock limits for estimating purposes. The lower limits, such as foundation walls and basement floors, are shown, but the upper limits are undetermined except from test pit calculations.

Therefore, while the intent of the Government is clear, the degree to which this fact has been made clear to the Contractors is gravely doubted.

23. When plaintiff encountered ledge rock, and after it had made claim on August 28 for extra payment for excavation thereof, it was directed by defendant to proceed with excavation to the depths shown in each instance on the drawings, and subsequently a conference was had prior to March 1, 1933, between plaintiff and a representative of the Legal Department of the National Park Service, Interior Department, with reference to the matter of payment, under the terms of the contract, for rock excavation at the contract unit price for excavation of rock. The contracting officer agreed with the claim made by plaintiff and decided that under the proper interpretation of the contract documents plaintiff was entitled to be paid for the number of cubic yards of rock actually excavated as an extra at the contract unit price of seven dollars per cubic yard. Accordingly, Oliver G. Taylor, Contracting Officer, prepared and signed "Extra Work Order No. 2" on March 1, 1934, and this order was

accepted and signed by plaintiff March 2. The extra work order was as follows:

> To: Central Engineering and Construction Company
>
> Pursuant to and in accordance with Article 5 of the Standard Form No. 23 of the Contract for the construction of the Naval Radio Station Buildings, dated July 19, 1933, you are hereby ordered to perform the following work:
>
> Remove all rock to depths as shown on drawings, in all cases at least 6 inches below the existing grade of ledge rock, to provide level, clean beds to support the foundation, and 5 inches below the finished floor of the basement.
>
> Payment for this extra work will be made in accordance with Articles 27 and 29, page 9 of the specifications and at the unit rate of $7.00 per cubic yard as listed under Item 29 of your Bid Schedule.
>
> It is estimated that the work to be performed under this order will cost approximately $3,570.

24. The extra work order and related papers were submitted to the Director of National Parks, Buildings, and Reservations, and were transmitted by him to the head of the department with the following memorandum recommending that the Order be approved:

> There is transmitted herewith for your approval and signature Extra Work Order No. 2 in connection with Contract #1-1p-1601, dated July 19, 1933, between this Department and the Central Engineering and Construction Company, covering the erection of the five buildings of the Naval Radio Station at Schoodic Point, Maine.
>
> This extra work order provides for extra work as follows:
>
> "Remove all rock to depth as shown on drawing, in all cases at least 6 inches below the existing grade of ledge rock, to provide level, clean beds to support the foundation, and 5 inches below the finished floor of the basement."
>
> This extra work order is made solely in the interest of the Government and involves the excavation of rock in foundation which was not anticipated and not indicated on drawings and which forms such an inseparable part of the work originally contracted for as to render it reasonably impossible of performance by other than the original contractor. The cost of the work is esti-

mated at approximately $3,570 which is considered just and reasonable.

It is respectfully recommended that the Extra Work Order be approved.

The extra work order was approved and signed March 19, 1934, by Oscar L. Chapman, Assistant Secretary of Interior, as head of the department under art. 18 (a).

The contracting officer sent this order to plaintiff with a letter of March 21, 1934, "I am handing you herewith Extra Work Order No. 2 covering excavation of rock in foundations of buildings of Naval Radio Station * * *. I have signed your estimate No. 7 and am forwarding same for payment."

25. The rock excavated and included in the extra work order as determined and certified by defendant's engineer as the work progressed was as follows:

	C. Y. Removed
Apartment Building:	
Within Bldg. lines	283
Soil pipe under basement	5
Steps (N. E. side)	22
Trenches:	
Sewer and Manhole #1 to front of Apartment	109.9
Manhole No. 1 to Power House & Apartment	15
Sewer on Garage side (Apt.)	41
Oil tank (Apt.)	7
Radio Compass Station	20
Other buildings: None	
Passage from gate to Battery room	5
Totals	507.9

26. After approval by the head of the Department on March 19, 1934 of Extra Work Order No. 2, the Government, through the contracting officer, paid plaintiff by monthly payment vouchers approved under art. 16 (a) of the contract for all rock excavation within the dimensions and lines shown on the drawings at the contract unit price of seven dollars per cubic yard. The total amount of rock so excavated was 507.9 cubic yards, as above stated, and the total of the amounts so paid was $3,555.30. The last monthly payment voucher was paid October 31, 1934.

27. The contract work was completed and accepted September 22, 1934, and on November 2, 1934, the contracting officer approved and signed the final voucher for payment of $12,829.82, representing the retained percentage of ten per-

cent under art. 16 (b) of each of the fourteen monthly payment vouchers which had been issued under art. 16 (a) of the contract. In accordance with regular practice this approved final voucher was forwarded to the General Accounting Office for pre-audit prior to payment. The Comptroller General on March 21, 1935 certified the voucher for $9,274.52 and disallowed the amount of $3,555.30 charged under Extra Work Order No. 2, and issued the following "preaudit difference statement":

> Item #6 of the schedule of costs given [gives] contractor's figure for all excavation as $1,500 and is included in the lump sum price bid for the entire work.
>
> In view of the plain and unambiguous requirements of the specifications, it is clear that there is no legal basis for payment to the contractor of any amount as extra work for the excavation of any rock encountered above the depth shown on the drawings and in the specifications. Such excavation was not extra work under the contract but was work included therein.
>
> Payment under extra Work Order No. 2 is not authorized.

28. A check in the amount thus certified was issued by the Treasury Disbursing Officer March 28, 1935, to plaintiff and was cashed by it on the same date, without reservation or protest. April 19, 1935, plaintiff presented its claim for $3,555.30 to the General Accounting Office. The claim was disallowed July 31, 1935. Upon review of such disallowance, requested by plaintiff November 7, 1935, the Comptroller General sustained same by a decision of May 22, 1936.

29. During the time the matter of payment for excavation of rock as an extra was under consideration, and at the time Extra Work Order No. 2 was issued, no consideration was given to the question of whether, in the circumstances, the additional amount due plaintiff under the contract for rock excavated should be adjusted or reduced by an equivalent amount of earth displaced by rock, at the unit price of 60 cents per cubic yard for excavation of earth, since plaintiff's bid and the lump-sum contract price were based on excavation of earth and gravel. That question was not raised. However, on November 7, 1934, the plaintiff, in prosecuting its claim made to the Comptroller General for payment of

the amount allowed by the contracting officer, after setting forth that in making its bid it set the cost of $1,500 for all excavation on the basis of earth and gravel in reliance upon par. 11 of the specifications, which stated that rock conditions differing from those shown on the drawings would be paid for as an extra, stated that "in view of this fact, we should reduce the amount of our claim somewhat. Since we figured to take out all gravel, we very likely should not claim the 60¢ per cubic yard quoted for gravel excavation. If this is so, we would be glad to do this and reduce our claim $304.75, which is 507.9 yards at 60¢ per yard." Plaintiff sent a copy of this letter to the contracting officer.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff and defendant, represented by its contracting officer, Oliver G. Taylor, Chief of the Eastern Engineering Division, National Parks, Buildings, and Reservations, Department of Interior, entered into a contract dated July 19, 1933, under which plaintiff agreed to construct "(a) Five Naval Radio Station Buildings, having plumbing, heating, and electrical systems; all complete and ready for use, (b) A complete water supply system, including pump, motor and pipe lines from Government well to Apartment Building and Intercept Building, (c) Electric service lines to the five Naval Radio Station Buildings and the two Radio Towers from the Main Panel board in the Power House." The contract was signed by plaintiff shortly before August 1, 1933; it was signed by defendant by the contracting officer and approved by the head of the department August 1, 1933. The executed contract was delivered to plaintiff August 4, 1933, and notice to proceed with the work was thereafter given.

The buildings, systems, and installations referred to, including the excavations and other work in connection therewith, to be done by plaintiff and by defendant were described and explained in those provisions of the specifications referred to in the findings herein. The site of the structures was on Big Moose Island at the southern end of Schoodic Peninsula, on the coast of Maine, and their

locations were from 750 to 1400 feet northwest from the coastline at the mouth of Arey Cove. The terrain had an upward slope from the coastline, and the area where the buildings were to be constructed was covered with a very thick growth of spruce woods. Outcroppings of ledge rock are common on Big Moose Island, and fragments of ledge rock were at places exposed on the surface of the ground at or near the site of the Apartment Building, which was the largest structure called for by the contract.

Plaintiff sues to recover $3,555.30 allowed by the contracting officer and the head of the department as an extra under the contract for 507.9 cubic yards of rock excavated by plaintiff at a unit price of $7.00 per cubic yard; and the question presented is whether, under the terms and conditions of the contract, specifications, and drawings, as written and as intended by the parties, this allowance or any part of it was authorized and proper.

After approval by the head of the department on March 19, 1934, of Extra Work Order No. 2, quoted in finding 23, the Government through the contracting officer paid plaintiff by monthly payment vouchers approved under art. 16 (a) of the contract for all the rock excavated within the dimensions and lines shown on the drawings at the contract unit price of $7.00 per cubic yard. The total amount so excavated was 507.9 cubic yards, and the total of the amounts so paid was $3,555.30. On November 2, 1934, after the contract work had been completed and accepted on September 22, plaintiff and the contracting officer prepared and signed a final voucher for payment of $12,829.82 representing the retained percentage on previous monthly payments under art. 16 (b).

This final payment voucher, which also disclosed all payments which had been made under change orders and extra work orders, was sent to the General Accounting Office for preaudit before payment of the amount of retained percentage. The Comptroller General disallowed, as being unauthorized, the entire amount of $3,555.30 and deducted it from the $12,829.82 shown on the vouchers. The Comptroller General wrote three opinions, the first set forth in finding 27. He held that Extra Work Order No. 2 was

unauthorized and without consideration "in view of the plain and unambiguous requirements of the specifications." He lightly passed over par. 11 of the specifications, saying, in effect, that the absence of any indication on the drawings as to conditions of the rock rendered par. 11 of no consequence. He relied upon the preceding paragraph, numbered 10, and concluded since that provision, as well as others, mentioned rock and stated that the contractor should remove all rock to the depths shown, and that since such depths were shown on the drawings, such rock excavation as might become necessary was required to be included in the lump-sum bids and lump-sum contract price for all work complete, and that if plaintiff did not include the cost of the rock excavation in its lump-sum bids it had simply submitted bids that were too low and the Government could not be held responsible therefor. Counsel for defendant seek to sustain the Comptroller General's decision.

The formal printed contract signed by the parties, which made the specifications and drawings a part of it, was the Standard Government Form of Construction Contract. The defendant's specifications and drawings were prepared especially for this construction project and in view of the language and the many provisions of the specifications concerning excavation, including rock, to the depths shown for the basements and foundations of the buildings and facilities, and the fact that none of the drawings relating to excavations contained any note, tracing, or indication as to "rock conditions," the intention of the parties to the contract concerning the matter of payment for rock excavation becomes important, i. e., whether they intended by the provisions of the contract documents that such payment was required to be included in the lump-sum bids for each building and in the total lump-sum contract price, or whether such rock excavation as might be found to be necessary in order to conform to the excavation lines and dimensions shown on the drawings should be paid for as an extra at the unit price of $7.00 per cubic yard bid and included in the contract in connection with excavation of rock. The specifications are clear that the contractor would be required to perform the specified excavation work, whether it con-

sisted of earth or rock, and it is also clear from the language of the specifications that they anticipated or contemplated that some rock excavation would probably be necessary. This, however, does not, as the Comptroller General thought, answer the question presented. The specifications and drawings were not clear as to the matter of whether the lump-sum bids required for each of the five buildings and each of the two systems should be based upon and include the amounts to be paid for excavation of all material, whether earth or rock, to the depths shown; or whether the lump-sum bids might or should be based on excavation of earth, leaving the matter of payment for such rock excavation as might be found necessary to adjustment on the basis of the unit price called for and submitted with the lump-sum bids.

After examining the site and considering the specifications and the drawings, plaintiff interpreted them as last above mentioned and computed his seven lump-sum bids, totaling $123,760, on the basis of earth excavation only to the depths shown according to the lines and dimensions entered on the excavation drawings, the total amount included for such excavation being $1,500; and under the unit-price provisions of the specifications and bid form, plaintiff submitted, among others, a unit-price bid of $7.00 per cubic yard for excavation of rock. We think this interpretation of the contract documents was a reasonable one.

The specification provisions most directly pertinent to the matter of excavation and as to how the bids might be computed and made are paragraphs numbered 9 to 13, inclusive; 16 and 17 relating to the Apartment Building; and 41 of the General Conditions. These paragraphs are as follows:

EXCAVATION

9. Remove all vegetable matter (top soil) from the area occupied by the building and stack at the site where directed.
10. Remove all rock to depths as shown, in all cases at least 6 inches below the existing grade of ledge rock, to provide level, clean beds to support the foundations, and 5 inches below finished floors of the Basement.

11. In case the actual conditions of rock differ from those shown on the drawings, an adjustment in the contract price will be made, based on a unit price basis to be submitted with the estimate.
12. This Contractor shall excavate to the dimensions and depths indicated or necessary for all foundation walls, interior bearing walls, pier footings and trenches for interior piping as shown on the Plumbing Drawings.
13. Excavate for the footing drains shown along the North East side.

SUPERFLUOUS EARTH

16. This Contractor shall spread or dump all superfluous excavated material around the immediate vicinity of the building at a distance not greater than 80 feet as directed.

TOPSOIL

17. Material from the excavation suitable for topsoil shall be deposited in piles separate from the other excavated material. Piles of topsoil shall be located so that the material can be readily used for finished surface grading and shall be protected and maintained until the completion of the General Contract.

UNIT PRICES

41. (a) The Contractor shall submit with his bid the following unit prices for use upon any or all work.
    a. Excavation (earth) in bulk per cu. yd.
    b. Excavation of rock and boulders over ½ cu. yd. per cu. yd.
    c. Concrete in piers and walls, per cu. yd.
    d. Reinforcement rods per pound.
    e. Concrete wall forms per sq. ft.
    f. Concrete pier forms per sq. ft.
  (b) Such prices will be used as a basis for correlation with articles 3 and 4 of the Standard Government Form of Contract.

The drawings applicable to excavations for the different structures and installations showed the dimensions and depths of excavations, which, so far as required of plaintiff, were from six inches to 5½ feet for building, and from 4 to 6 feet

for sewer trench adjacent to Apartment Building, but none of the drawings showed or indicated "conditions of rock" by a note, tracing, or statement. The specifications were apparently written before the defendant had examined the site and dug the test pits. Par. 11 rather clearly indicates that its intention was that the drawing would indicate the rock conditions to the extent that the contractor should include same in his lump-sum bids called for in the Bid Form, and that rock conditions not so indicated which might be encountered would be paid for as an extra at the contract unit price called for in the bid. (See art. 1 of the contract, finding 2.)

A reading of paragraphs 10 and 11 together, as they must be read because both were dealing with rock conditions, and a consideration of the excavation drawings in the light of the natural meaning of the language of those paragraphs reasonably supports plaintiff's interpretation that the absence of any indication on the drawings as to rock conditions meant that if rock should be encountered and had to be excavated, such "actual conditions of rock" would "differ from those shown on the drawings," and would call for "an adjustment in the contract price * * *, based on the unit price basis to be submitted with the estimate."

The contracting officer and the head of the department agreed with plaintiff's interpretation of the intent and meaning of the specifications and drawings, and any ambiguity which might otherwise appear on the face of the documents is therefore now of no moment. The interpretation of a contract by the parties to it before it becomes the subject of controversy is deemed by the courts to be of great, if not controlling, weight. *Baltimore* v. *Baltimore and Ohio Railroad Co.*, 10 Wall. 543; *Brooklyn Insurance Co. of New York* v. *Dutcher*, 95 U. S. 269; *Old Colony Trust Company* v. *City of Omaha*, 230 U. S. 100. "* * * the meaning of the contracting parties is the agreement." *Whitney* v. *Wyman*, 101 U. S. 392, 396. "The intent of the parties is the contract, and whenever that is ascertained, however inartificially expressed, it is the duty of the courts to give it effect." *George* v. *Tate*, 102 U. S. 564, 570; *North Pacific Emergency Export Association* v. *United States*, 95 C. Cls. 430, 448, 449.

Aside from the interpretation of the contract as evidenced by the issuance of Extra Work Order No. 2, there is other direct evidence which shows such intent. When plaintiff encounterd rock and found that a considerable amount would have to be removed in excavating to the dimensions and depths shown on the drawings, it made claim for payment therefor as an "extra," and the acting contracting officer promptly replied and, after quoting the substance of par. 10 of the specifications, stated that "The limit of excavation as shown on the elevations of the buildings, therefore, indicates, in line with this article [para.] 10, the rock conditions, referred to in art. [para.] 11, that were expected to be encountered." Further in this letter he stated that "When the plans [drawings] were drawn the depths of foundations were determined by the elevation of rock as shown by a series of test pits. These pits were afterwards left uncovered with rock exposed to serve as a guide to bidders in calculating the amount of rock that would be necessary." This letter indicates why the Government did not insert on the drawings any note or tracing of "conditions of rock" as contemplated by par. 11, and that this omission was because the depths of foundations were determined by the test pits. Plaintiff's president was uncertain in his testimony how deep these test pits were; he stated that they were from about two to three feet deep, but the above letter indicates that some of them were probably five feet deep. The maximum depth of excavations required of plaintiff was six feet, and for the most part the depths were from one and one-half to five and one-half feet.

In addition to the foregoing, the evidence shows that it is one of the recognized customs in the construction industry to base specifications and bids with reference to excavation on earth excavation, which is easy of calculation, leaving the matter of payment for such excavation of rock as may be necessary to adjustment on the basis of separate unit prices, or by some other method. It is obvious that the contracting officer considered this custom and the reasonableness of plaintiff's interpretation of the specifications and drawings in reaching his decision to issue Change Order No. 2. The Government frequently adopts that practice. *Dewey*

Schmoll, et al. v. *United States*, 93 C. Cls. 572, 575; *Union Engineering Co., Ltd.*, v. *United States*, 97 C. Cls. 424, 429, 430; *John M. Whelan & Sons, Inc.*, v. *United States*, 98 C. Cls. 601, 617; *Rego Building Corp.* v. *United States*, 99 C. Cls. 445, 452, 459.

The evidence further shows that when submitting the Extra Work Order No. 2 to the head of the department for approval, the statement was made that the order for payment as an extra "involves the excavation of rock in foundation which was not anticipated and not indicated on the drawings" and that the extra work order "is made solely in the interest of the Government."

In view of the specific provisions of the specifications and the interpretation of the parties, the Standard "Examination of the site" provision, contained in par. 16 of the General Conditions of the Specifications, is not controlling here.

The allowance of payment for the 507.9 cubic yards of rock excavated as an extra does not result in a double payment to plaintiff for "excavation" since plaintiff based its bid on earth and gravel excavation. However, in view of the evidence, plaintiff is not entitled to recover the full amount of $3,555.30 claimed and computed at $7.00 per cubic yard since this rock excavation displaced an equal amount of earth excavation which plaintiff did include in its lump-sum bids and which it would have been required thereunder to excavate if rock had not been encountered within the dimensions and lines shown on the drawings. The deduction from the total of $3,555.30 of $304.75, representing 507.9 cubic yards of displaced earth at the unit price of sixty cents per cubic yard, gives plaintiff under the contract a net of $7.00 per cubic yard for rock, or $3,250.55 in addition to the lump-sum contract price. *Rego Building Corporation* v. *United States*, *supra.*

Judgment will be entered in favor of plaintiff for $3,250.55. It is so ordered.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.

WHALEY, *Chief Justice*, dissenting:

I cannot agree with the majority opinion.

We are dealing with a lump-sum contract. The three cases cited in the majority opinion as upholding the custom of the Government in dealing with contracts of this nature are not apposite because the contracts in those cases were not lump-sum contracts. They specifically provided for payment of rock excavation as an extra, not to be included in the amount bid. The contract under consideration provided for payment for "extra rock excavation" which plainly showed that some rock excavation was included in the amount in the contract. Double payment for the same work was not intended and, in my judgment, cannot be allowed. To permit recovery is allowance of double payment.

In July 1933 plaintiff entered into a contract with the Department of the Interior, National Park Service, to construct an apartment building, a powerhouse, pump house, interceptor building, and a radio compass station complete with plumbing, heating and electrical systems, a complete water supply system and certain electric service lines, for a lump sum of $123,760.00.

These buildings were to comprise a Naval Radio Station on Big Moose Island at the southern tip of Schoodic Peninsula, on the coast of Maine. The coastline of this island consisted mostly of rock formation. Outcroppings of ledge rock are common to Big Moose Island and fragments of ledge rock were exposed on the surface of the ground at and near the radio station site.

The contract required that plaintiff visit the site and make its own examination before bidding. The site was visited by the plaintiff and it found shallow pits, which defendant had dug, appearing to be test holes but plaintiff did not find any ledge rock disclosed therein. The drawings did not indicate whether or not there was ledge rock. The specifications clearly and distinctly notified plaintiff that there was certain information given on the drawings, specifications, and accompanying plans, which had been obtained by the Government and which was believed to be reasonably correct but that the Government did not warrant its complete-

ness or accuracy and the prospective bidders were warned to make their own examinations.

This was a lump-sum contract containing, under article 41 of the specifications, a provision requiring plaintiff to submit specific prices which it would charge for the removal of extra earth excavation and rock excavation.

Paragraph (b) of Article 41 of the specifications above provided:

> Such prices will be used as a basis for correlation with articles 3 and 4 of the Standard Government Form of Contract.

Article 3 provides for an equitable adjustment where changes are made and for the contract to be modified accordingly.

Article 4 provides for "changed conditions."

The specifications for the excavation for the apartment building provided:

> 9. Remove all vegetable matter (topsoil) from the area occupied by the building and stack at the site where directed.
>
> 10. *Remove all rock to depths as shown*, in all cases at least 6 inches below the existing grade of ledge rock, to provide level, clean beds to support the foundations, and 5 inches below finished floors of the Basement.
>
> 11. In case the actual conditions of rock differ from those shown on the drawings, an adjustment in the contract price will be made, based on a unit price basis to be submitted with the estimate. [Italics mine.]

The specifications with respect to the powerhouse, pump house, and interceptor building provided for excavation "to the required depths, as shown on drawings," and for the radio compass station, "remove the topsoil and excavate the rock to dimensions and depth as shown."

The difference between these two expressions is simply that with respect to the powerhouse, pump house, and interceptor building the depths shown are those on the drawings; with respect to the apartment house and the radio station, the words "on the drawings" are lacking.

The only place that the depths could be shown would be on the drawings and the drawings provided that the excava-

tions to be made by the plaintiff under its lump-sum contract were from 6 inches to 5½ feet below the natural surface of the ground for the buildings and from 3 feet to 14 feet for certain sewer trenches.

There was no test pit data nor was there on the drawings any reflection of the subsurface conditions or the material which existed below the ground.

During the course of the work in August 1933, plaintiff encountered ledge rock in excavating the foundations of the various buildings and requested of the contracting officer in writing extra pay for this work. In September the contracting officer advised the plaintiff that the specifications required him to "remove all rock to depths as shown" and "in all cases at least six inches below the existing grade of the ledge rock." Plaintiff was advised that, if the excavations had to be made to a greater depth than shown on the drawings, an adjustment would be made according to the provisions of Article 11 of the specifications.

Practically all of the total quantity of rock herein involved was removed prior to February 3, 1934, and on March 1934 an extra work order was issued by the defendant allowing payment for extra work in accordance with Articles 27 and 29 of the specifications at the unit rate of $7.00 per cubic yard, an estimated total of approximately $3,570.00. This extra work order was approved by the Assistant Secretary of the Interior. Defendant's survey of the rock excavation on November 27, 1934, showed a total of 507.9 cubic yards.

Plaintiff was paid the sum of $3,555.30 by the disbursing officer and, when the contract was completed and the final settlement applied for to the General Accounting Office, the Comptroller General deducted the amount which had been paid under the Extra Work Order on the ground that the plaintiff had a lump-sum contract and no work had been done which was not included in the amount of plaintiff's bid; and that the Extra Work Order was for the identical work which was required by plaintiff's contract.

There is nothing to show in the agreed facts that the plaintiff excavated below depths shown on the drawings.

The dispute in this case is not on any question of fact but on the validity and effect of the so-called "Extra Work

Order" issued by the contracting officer. Defendant claims that it is invalid. This is the sole issue.

The only difference between the specifications and the Extra Work Order is that the specifications provide "remove all rock to depths as shown" and the Extra Work Order provides "remove all rock to depths as shown on drawings."

The only place that the depths are shown is on the drawings and when plaintiff made its bid it had the drawings and knew, or should have known, that the drawings required that excavation should be at least six inches to 5½ feet below the natural surface of the ground for the buildings and from 3 feet to 14 feet for certain sewer trenches. The adding of the words in the Extra Work Order "on the drawings" did not clarify or make more plain the specifications which provided that the excavations should be made "as shown."

Any contractor of experience or engineer of even limited experience would have naturally gone to the drawings to ascertain the depths to which the excavations would have to be made.

Therefore, there was no difference between the Extra Work Order and the contract specifications as to the work involved. The work described was identical.

Article 11 of the Specifications, quoted in Finding No. 7, providing that in case the actual conditions of rock were different from those shown on the drawings the contract would be adjusted, is not important because the drawings did not show the rock conditions. The Government made no representations as to subsurface conditions. It specifically required that the plaintiff should make its own examination and notified it that the data which the Government possessed was not, and should not be taken as, a warranty of the subsurface conditions. There was no agreement as to whether they would encounter earth or rock except in the specifications, where under Article 10 there is mention of "existing grade of ledge rock," and the existing grade was to be ascertained by the plaintiff in his own examination of the site.

In my opinion, insofar as Extra Work Order No. 2 is concerned, it attempts to increase the contract price, and is plainly without consideration, for it was a duplication of the

work which the plaintiff was required to do under the contract and included in the lump-sum bid. To allow payment on this Extra Work Order would constitute double payment for the same work performed by the contractor.

Whether or not it was a mistake to issue this Extra Work Order, it could not create a liability. In the case of *Bausch & Lomb Optical Co.* v. *United States*, 78 C. Cls. 584, 607, the court said:

> In these circumstances the contract of March 8, 1919, was one the contracting officer, Major Hawkins, had no authority to make and the United States was not bound by it. *William Tod Wilcox* v. *United States*, 56 C. Cls. 224. If the plaintiff's claim against the War Department for one-fourth part of the cost of the extra guards was based on a contract, express or implied, the contract of March 8, 1919, added nothing to plaintiff's legal rights. If the claim was not based on such a contract it was invalid and unenforcible against the United States and could not be vitalized into a legal claim by a subsequent contract. Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforcible against it.

In my judgment the petition should be dismissed.

JONES, *Judge*, took no part in the decision of this case.

H. E. HELE v. THE UNITED STATES

[No. 45473. Decided April 2, 1945]

On the Proofs

Government contract; cancellation of revocable lease of land in Canal Zone; determination of reasonable value of improvements.—Under the provisions of the Act of February 27, 1909 (35 Stat. 658), providing for the leasing of lands in the Canal Zone on condition that leases entered into under the act were revocable at the option of the United States, under certain conditions, plaintiff in 1923 obtained a lease on a given tract of land, and paid the agreed purchase price of the improvements thereon. In 1939, the Governor of the Canal Zone, in accordance with the statute and the terms of the lease, cancelled the lease and

offered to plaintiff $818.00 as the appraised value of the improvements, which plaintiff refused to accept, and brought suit for the reasonable value of the improvements. It is *held* that plaintiff is entitled to recover $907.00 as the reasonable value of the improvements, representing the value of the usable materials in the remaining buildings plus the value of the trees, sprinkler system and sanitary toilets, installed by plaintiff during the life of the lease.

Same; determination of value by Canal Zone Governor not final.—Although the parties agreed that the determination of the Governor of the Canal Zone was final, unless arbitrary or palpably erroneous; it is *held* that the decision of the Governor was not final, since he was not the agency designated by the Act to determine the value of the improvements. See *Hele* v. *United States*, 100 C. Cls. 289.

Same; basis for determination of value under 1909 Act.—The Act of February 27, 1909, contemplated reimbursing a lessee for all expenditures made by him for improvements, less depreciation.

The Reporter's statement of the case:

Mr. J. J. Lenihan for plaintiff.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Pursuant to instructions contained in a letter of October 18, 1921, from the Secretary of War, the Governor of The Panama Canal, on December 2, 1921, issued Circular No. 713–1 making certain lands in the Canal Zone available for agricultural purposes. This circular, among other things, provided:

> 3. These lands will be assigned under revocable licenses subject to the following provisions:
>
> (a) If at any time it shall become necessary for the United States to occupy or use the whole or any portion of the lands covered by any such revocable license, it shall have the right to do so without further compensation to the licensee than the reasonable value of the improvements made by him upon said tract, said value to be determined in such manner as the Governor may direct.

2. On January 29, 1923, an agreement was entered into between the Supply Department of The Panama Canal, represented by Mr. R. K. Morris, Chief Quartermaster, and the plaintiff, Mr. H. E. Hele, whereby the Canal agreed to sell

and Mr. Hele to buy ten buildings situated on land, known as the Summit Poultry Farm, within the area described in Circular No. 713–1. This agreement contained the following provisions:

> The purchase price of said buildings is the appraised value of $4,400.00 to be paid in monthly installments of $50.00 per month payable on the first day of each month with interest at the rate of 6 per cent per annum as follows: Interest on the unpaid amount will be computed for each six months' period and the amount of such interest added to the principal from which is deducted the monthly payments which have been made during that six months. The new principal will be the amount upon which interest will be computed for the succeeding six months; monthly payments of $50.00 per month to be continued until the entire amount of principal and interest shall have been paid.
>
> The buildings sold are situated as shown on Panama Canal blueprint No. 6052–1, and are described as follows:
>
> 1 Barn, indicated, approximately 48′ x 75′ x 20′;
>
> 1 Incubator house, indicated, approximately 20′ x 50′ x 5′;
>
> 1 Primary brooder house, indicated, approximately 24′ x 100′ x 6′;
>
> 2 Secondary brooder houses, indicated, approximately 30′ x 150′ x 6′6″; and
>
> 5 Colony houses, indicated as Nos. 0–1, 0–2, 0–3, 0–4, and 0–5, being approximately 16′ x 150′ x 7′2″ x 6′6″ back.
>
> The title to buildings sold shall remain with the Supply Department of The Panama Canal until fully paid for and none of said buildings shall be removed or destroyed before the purchase price has been paid in full except with prior written consent of Canal. Said buildings shall also be maintained in fair state of repair until all payments have been completed.
>
> In case the Contractor shall at any time be in default in the payment of the monthly instalments as herein provided so as to become in arrears for such payment for a period of two months or more, The Panama Canal shall have the right to take possession of the buildings herein described without compensation to the Contractor and by taking such possession shall relieve the Contractor of any further payments after such possession is taken.

> License for the occupancy of the ground on which these buildings are situated will be arranged by the Contractor with the Land Agent.

3. On March 21, 1923, the Land Agent issued Revocable License No. 625–B–E to plaintiff covering twenty-four (24) hectares of land on which the ten buildings were situated, a hectare containing about 2½ acres. However, it soon developed that there were only eight and one-half (8½) hectares in the tract intended to be licensed to plaintiff, and on April 13, 1923, the Land Agent cancelled the license issued on March 21, 1923, and issued to plaintiff a new license, bearing the same number, covering eight and one-half (8½) hectares on which the buildings were situated. On June 9, 1924, plaintiff accepted this new license under protest.

4. Each license described in finding 3 stated on its face that it was revocable, provided for the payment of a yearly rental of $5 per hectare and contained the following provision:

> 6. The licensee agrees that if at any time it shall become necessary for the United States to occupy the whole or any portion of the land covered by this license, it shall have the right to enter upon and take possession of said land without further compensation to the licensee than the reasonable value of the improvements made by the licensee upon the said tract, the said value to be determined in such manner as the Governor of The Panama Canal may direct.

5. The plaintiff, after purchasing the buildings in January 1923, and getting his license, took possession of the land and ten buildings thereon and from then until less than a year prior to November 30, 1939, operated a chicken farm and poultry business on and in them. He also raised a garden and feed for his chickens. By November 1934 plaintiff had completed all payments on the buildings, the amounts paid being $4,400 principal and $1,517.31 interest, making a total of $5,917.31 paid by plaintiff.

6. On November 30, 1939, The Panama Canal revoked plaintiff's license while he was still in possession of the property, allowed him until March 1, 1940 to remove any improvements he might desire to remove from the land, and appraised the value of the improvements at $818, made up of

$134 for trees, $325 for the concrete foundations of the ten buildings and $359 for the superstructures of the five buildings which were still standing at that time. The $818 was offered to plaintiff but he refused to accept it, and not having removed any of the improvements from the land, plaintiff instituted this suit for their value.

7. The ten buildings were constructed in the years 1917 and 1918 or earlier. They all had concrete foundations, floors and drains, and also concrete rat walls which extended two feet below the ground, one foot from the ground line to the floor and one foot above the floor, making four feet of rat wall. The superstructures were of wood and they had galvanized iron plates on their roofs. Their sizes were as stated in the written agreement of January 29, 1923. They were in fairly good condition when plaintiff bought them in 1923, but prior to the revocation of the license on November 30, 1939, the superstructures of five of the buildings had become so dilapidated that plaintiff had torn them down, leaving only the concrete foundations, floors, drains, and rat walls. These five buildings which plaintiff tore down were the two secondary brooder houses and three of the colony houses. Their value had constituted $2,325 of the $4,400 which plaintiff had agreed to pay for the ten buildings in 1923. The remaining five buildings were still standing on November 30, 1939. Only one of them had any remaining useful value. The others were infested with termites and were on the verge of collapsing. One of them, a colony house known as No. 40, had some slight value, not to exceed $135.36, not taking into consideration its knock-down value. The remaining value in place of the improvements purchased by plaintiff at the time of the execution of the lease was not more than $135.36.

The knock-down or salvage value of all of the materials in all the buildings remaining on the property at the time of the cancellation of the lease was $718.00.

The concrete foundations, floors, drains, and rat walls had no salvage value.

8. After plaintiff bought the buildings and got the license he planted and cultivated some trees on the property; he constructed some concrete septic tanks and paths; he fixed up

a garden that had some growing crops on it which could not ripen and be harvested by March 1, 1940, and he installed for the garden a sprinkler or irrigation system consisting of several hundred feet of 2-inch iron pipe buried about six inches deep in the ground but with risers or sprinklers every 50 or 60 feet to sprinkle the garden. By November 30, 1939, the pipes had become badly rusted and corroded, and in some places broken. The system was worth little, if anything, on November 30, 1939, and was torn up by the Canal soon after the revocation of the license. A Chinaman operated the garden and all the plaintiff was to receive from it was some green vegetables for himself and family and for his chickens. However, he had disposed of his chickens nearly a year before his license was revoked.

The reasonable value of the trees, sprinkler system, and septic tanks was $189.00.

9. The reasonable value of the improvements on the premises at the time of the cancellation of the lease was $907.00.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On February 27, 1909, Congress passed an Act (c. 224, 35 Stat. 658), providing for the leasing of lands in the Panama Canal Zone on condition that all leases "shall be made subject to the provision that if at anytime it shall become necessary, notwithstanding, for the United States to occupy or use any portion of the leased lands, it shall have the right to so do without further compensation to the lessee than for the reasonable value of the necessary improvements made upon his tracts by the lessee, the same to be determined by the courts of the Canal Zone."

On March 21, 1923, there was leased to plaintiff 8½ hectares of land in the Canal Zone under a so-called license containing the provision required by the foregoing Act, except that it said that the value of the improvements were "to be determined in such manner as the Governor of the Panama Canal may direct."

For the improvements on the land at the time the lease was executed the plaintiff paid the Panama Canal the sum of $4,400. He occupied the premises until November 30,

1939, when his lease was cancelled. As the result of appraisals made of the improvements on the tract the Governor fixed a value for them of $818.00, and this sum was tendered to plaintiff, but he refused to accept it. He brings this suit to recover their reasonable value.

The parties agree that the determination of the Governor is final unless arbitrary or palpably erroneous, but we do not think this is true, since he was not the agency fixed by the Act to determine the value. See our former opinion in this case reported in 100 C. Cls. 289.

The parties disagree as to the basis for the determination of the reasonable value. The plaintiff says it is the cost of reproduction, less depreciation, and all of his testimony as to value is based upon this premise. We think this is the wrong premise. We think the Act contemplated reimbursing a lessee for all expenditures made by him in the making of improvements, less depreciation. The intent of Congress was to save a lessee from harm from the cancellation of his lease. It was intended only that he be reimbursed for out-of-pocket expenditures. Especially is this true in a case where the evidence shows, as in this case, that the lessee had abandoned the business for which the buildings were built and had no intention of operating the business elsewhere.

Plaintiff paid $4,400 for the improvements on the land at the time he took the lease and he spent a small amount of money in making additional improvements. The principal controversy is over the reasonable value of the improvements on the land when the lease was entered into.

The improvements on the land when it was leased were buildings for a chicken farm. They consisted of a primary brooder house, two secondary brooder houses, an incubator house, a barn, twelve laying houses, and five colony houses. They were built in 1917 and 1918 or earlier. At the time of the cancellation of the lease five of them had worn completely out and had been torn down; five still stood, but all of them were infested with termites and were on the verge of collapsing, except a colony house known as building No. 40. There was some value left in this building, but very little.

The Board of Appraisal, consisting of four men appointed by the Governor, found that on the basis of the original cost

of this house, figuring depreciation at 4 percent, it had a remaining value at the time of the cancellation of the lease of $135.36. Upon the basis of the amount paid for this building by Mr. Hele they found it had a value of $22.91. The Board found that the water pipes and faucets installed by Mr. Hele had a remaining value of $30.00, and two sanitary toilets installed by him had a remaining value of $25.00. On the basis of original cost the Board found that the value of all the improvements, with the exception of some trees planted on the property by Mr. Hele, had a value of $190.36, and on the basis of the price paid for the improvements by Mr. Hele they had a value of $77.91. It is agreed that the trees had a value of $134.00. Adding this to the Board's figure of $190.36 would make a total value of all the improvements $324.36.

We are of opinion that the above finding of the Board was correct, except as hereinafter pointed out.

The testimony shows that these buildings were depreciated on the books of the Panama Canal Zone at 10 percent, but the report of the Board of Appraisal states that they possibly might have lasted as long as 25 years had they received average maintenance, but that it was evident that they had not received such maintenance, and in view thereof it was of the opinion that 20 years should be considered as the maximum life for the purpose of fixing depreciation. The plaintiff purchased them when they were not less than 5 years old, which would give them a remaining life on this basis of 15 years. The plaintiff occupied the premises and used the buildings for a period of approximately 17 years, so that theoretically, at least, their useful life would have been exhausted by the time the lease was cancelled. In fact, the condition of all the buildings, except one, was such at the time of the cancellation of the lease that they had no further useful value. They were all about to fall down, with the sole exception of building No. 40, above referred to. Indeed, one of them did fall down a few months after the lease was cancelled.

It, however, appears that plaintiff had put some galvanized iron on the roofs of some of the buildings and on the sides of some of them. This was found by the Office En-

gineer to have had a knock-down value of $460.00, and he found that other parts of the buildings had a knock-down value of about $258.00, making a total value of the useable materials in the buildings of $718.00. Plaintiff was entitled to get for the improvements on the place the maximum sum he could realize in any way, either by selling the buildings in place or by tearing them down and selling the materials in them. We, therefore, think he is entitled to be paid this value of $718.00. To this must be added the value of the trees put on the place, which it is agreed was $134.00, and the value of the sprinkler system, $30.00, and the sanitary toilets, $25.00, making a total of $907.00. This amount the plaintiff is entitled to recover.

On this method of valuation it is obvious that nothing can be allowed for the concrete since it, of course, could not have been removed and sold. It had no value in place except to one desiring to erect a new building on it, and no one did. The chicken farm had been abandoned by plaintiff before the cancellation because unprofitable and no one wanted to start another one.

Judgment will be entered in favor of plaintiff for the sum of $907.00. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

EDGAR TOBIN v. THE UNITED STATES

[No. 45705. Decided April 2, 1945]

On the Proofs

Government contract for aerial photography and maps; liquidated damages provisions not applicable to delivery of original prints and maps for approval.—In a contract with the Government for the making of certain aerial photographs, including contact prints, enlargements, index maps and negatives, covering a designated area, it is *held* that the provision for liquidated damages for delay in the delivery of "contact prints with maps" does not apply to the late delivery of original flying prints and maps, submitted for approval, and plaintiff is entitled to recover.

Same.—A provision in contract for liquidated damages can not be based upon an implication unless the implication is plain.

Same.—Where provision in contract for taking aerial photographs expressly provided that there should not be liquidated damages for time between dates of delivery and acceptance or rejection of contact prints with index maps; it is *held* that there can not be implied from the language of the contract that there could be liquidated damages before such delivery.

The Reporter's statement of the case:

Mr. Errett G. Smith for the plaintiff.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the evidence and a stipulation of the parties:

1. Plaintiff, Edgar Tobin, is and, at all times pertinent to this case, was an individual doing business and trading as Edgar Tobin Aerial Surveys and has his principal office at 502 Mistletoe Street, San Antonio, Texas.

2. Plaintiff and the defendant, the latter acting through Harry L. Brown, Acting Secretary of Agriculture, as contracting officer, entered into a contract dated March 15, 1938, pursuant to which plaintiff undertook to furnish to the Agricultural Adjustment Administration in the Department of Agriculture certain aerial photographs, including contact prints, enlargements, index maps and negatives covering a certain designated area of Barrow County, and the entire areas of Jackson and Madison Counties, all in Georgia, together with certain other areas not material to this suit, in accordance with the terms of the contract and an invitation, bid, and acceptance (U. S. Standard Form 33 Revised), continuation schedule attached thereto and certain specifications, all of which were made a part of the contract by reference. Exhibit A attached to plaintiff's petition, and made a part hereof by reference, is a true and correct copy of the contract documents, except for certain omitted provisions not material to this suit.

The continuation schedule attached to the invitation, bid, and acceptance contained the following provisions:

> Contact prints and photo-index maps for each county project shall be shipped to the corresponding State office

of the Agricultural Adjustment Administration—the address of which will be supplied the successful bidder at the time of making the award—within fifteen (15) calendar days after the date final flying is completed on said county unit. The final delivery of contact prints and photo-index maps for each county project shall be completed within fifteen (15) calendar days after the contractor has received written notice of the acceptance of the flying (see specifications, paragraph 27 (a)).

The delivery of enlargements for each county project shall be completed within fifteen (15) calendar days after the contractor has received written notice of the acceptance of the flying and has received the ratio factors for said enlargements (see specifications, paragraph 27 (b)).

The specifications contained the following provisions:

1. *Statement of Work and Areas to be Photographed.*
(a) The contractor shall furnish all materials, superintendence, labor, equipment, and transportation, shall execute and finish the aerial photography of the areas hereinafter specified and shall deliver to the contracting officer, or to such official of the Government as he may designate, such sets of contact prints, index maps, ratioed prints, general enlargements, and oblique photographs as called for by the invitation and the schedule of the advertisement, together with the negatives herein required. All work shall be executed in an expeditious and workmanlike manner, to the satisfaction and acceptance of the contracting officer, in complete accord with these specifications and other conditions of bidding set forth in the invitation and in the schedule of the advertisement.

14. *Indexing.*

* * * * *

(c) Photo-index maps shall be prepared by photographing, to the approximate scale specified in the schedule of the advertisement, a stapled assembly of contact prints from each vertical negative carefully laid to match corresponding images and clearly showing the serial numbers of each negative.

26. *Commencement and Prosecution of Work.*
(a) The contractor shall undertake the photography of the areas to be photographed within 10 days after the receipt of notice to proceed, or within such other period of time as may be specified in the schedule of the advertisement unless no substantial areas are free from snow or high water at that time, in which case the time for

starting the work will be postponed until such areas are free from snow or high water. The contractor shall notify the contracting officer in writing the day his flying equipment and personnel arrive on the project and, unless otherwise authorized in writing by the contracting officer, shall keep said flying equipment and personnel continuously on the project until all the flying covered by the contract is completed and the contracting officer or his representative notifies the contractor by letter or by telegram that the photography is approved.

(b) If the area required to be photographed is made up of several separate areas of subprojects, the contractor shall photograph said subprojects in the order indicated in the schedule of advertisement and shall notify the contracting officer by letter or by telegram immediately upon completion of the photography for each such subproject. If any such subprojects or portions thereof are required to be rephotographed, the contracting officer shall indicate the order in which such work is to be performed and the contractor shall notify the contracting officer in each case immediately upon completion of said work.

27. *Time Allowance.*

(a) The maximum time allowance for delivery of contact prints, together with index maps, and oblique photographs will be the number of calendar days specified in the schedule of the advertisement, after the contractor has received the written notice of the acceptance of the flying.

(b) The maximum time allowance for delivery of ratioed prints and general enlargements will be the number of calendar days specified in the schedule of the advertisement after the contractor has received written notice of the acceptance of the flying, and has received the ratio and/or enlargement factors: *Provided, however*, That if the ratio and/or enlargement factors are to be determined by the contractor, the said time allowance shall be the number of calendar days specified in such schedule after receipt by the contractor of written notice of acceptance of the flying.

* * * * *

(d) The contractor shall not be liable for liquidated damages specified in paragraph 32, between the dates of delivery and dates of acceptance or rejection of contact prints with index maps, oblique photographs, ratioed prints, or general enlargements on original flights or any reflight under the foregoing specifications.

30. *Inspection and Acceptance.*

Immediately after the contact prints, index maps, and oblique photographs are received by the Government at the point designated in the schedule of the advertisement, they will be inspected, after which the contracting officer, or his representative, will notify the contractor in writing whether they are satisfactory and what areas, if any, shall be rephotographed because of nonconformity with the contract requirements. Ratioed prints and general enlargements will be inspected promptly upon receipt thereof by the Government, and any found by the contracting officer to be unsatisfactory shall be reprinted immediately.

31. *Delays—Damages.*

If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will assure its completion within the time specified, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties (if any) shall be liable to the Government for any excess cost occasioned the Government thereby. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amounts as set forth in paragraph 32 thereof, or in the schedule of the advertisement, and the contractor and his sureties (if any) shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, * * *

32. *Liquidated Damages.*

Unless otherwise specified in the schedule of the advertisement the fixed, agreed, and liquidated damages to be paid the Government by the contractor in accordance with paragraph 31 hereof, for each calendar day of delay in undertaking the work and in delivery after expiration

of the time allowance specified in paragraphs 26 (a) and 27 hereof, and in the schedule of the advertisement, shall be as follows:

Undertaking the work	$10
Contact prints with index maps	10
Oblique photographs	10
Ratioed prints	10
General enlargements	10

3. Plaintiff completed original flying coverage; i. e., the taking of photographs completely covering the contract areas in question on the following dates: Madison County, May 9, 1938; Barrow County, May 10, 1938; Jackson County, May 10, 1938.

4. On or about June 1, 1938, and in accordance with a provision in the contract documents the defendant permitted plaintiff to remove his equipment; i. e., his airplanes and cameras, from Barrow, Madison and Jackson Counties to another area covered by a separate contract, within the Agricultural Adjustment Administration, between plaintiff and the defendant, with the understanding that plaintiff would resume work in Barrow, Madison and Jackson Counties on or about November 1, 1938. Pursuant to this permission, plaintiff removed such equipment from Barrow, Madison and Jackson Counties, but resumed work in those counties on or about November 1, 1938. The equipment used by plaintiff in the developing of film, the printing of photographs, and the preparation of photo-index maps under the contract was at all times located at plaintiff's principal office at San Antonio, Texas.

5. During the course of his flying, plaintiff submitted to defendant weekly progress reports covering his flying of Madison, Jackson, and Barrow Counties, which constituted that subdivision of the Georgia contract area known as Block 5. One copy of each such weekly progress report is marked Exhibit 1 and is made a part hereof by reference.

6. Plaintiff shipped to the defendant contact prints and photo-index maps completely covering each of the contract areas involved in this suit on the following dates: Barrow County, September 19, 1938; Madison County, September 20, 1938; Jackson County, September 20, 1938. Prior to these dates, plaintiff had not submitted to the defendant any contact prints or photo-index maps.

7. On October 4, 1938, the defendant sent to plaintiff an "Inspection Memorandum" (Form SRM–209) covering the contact prints and photo-index maps for Barrow County. A copy of this "Inspection Memorandum" is marked Exhibit 2 and is made a part hereof by reference. The contact prints and photo-index maps for Barrow County, which plaintiff shipped to the defendant on September 19, 1938, were received by the defendant on September 22, 1938, and were satisfactory to the defendant. These were the last prints and maps for Barrow County received by the defendant.

8. On October 31, 1938, the defendant sent to plaintiff "Inspection Memoranda" (Form SRM–209) covering the contact prints and photo-index maps for Madison and Jackson Counties. Copies of these Inspection Memoranda marked Exhibits 3 and 4, respectively, are made a part hereof by reference.

9. Upon receipt of the "Inspection Memoranda" dated October 31, 1938, covering Madison and Jackson Counties, and also of later "Inspection Memoranda" requesting additional reflights of certain reflights in these counties, plaintiff performed to the defendant's satisfaction the reflights required by the defendant and completed such reflights for Madison County on December 13, 1938, and for Jackson County on January 24, 1939. Plaintiff shipped to the defendant on December 22, 1938, the contact prints and photo-index maps taken on the final reflights for Madison County, which the defendant received on December 27, 1938, and which were satisfactory to the defendant. These were the last prints and maps for Madison County received by the defendant. On February 4, 1939, plaintiff shipped the contact prints and photo-index maps taken on the final reflights for Jackson County, which the defendant received on February 7, 1939, and which were satisfactory to the defendant. These were the last prints and maps for Jackson County received by the defendant.

10. On January 6, March 6, and April 8, 1939, plaintiff received from the defendant "Ratio Factor Reports" containing the ratio factors required by plaintiff to produce photographic enlargements for Barrow, Madison, and Jackson Counties, respectively, under the contract, each of which

reports stated that it represented final approval of the flying in the particular county. Copies of these Ratio Factor Reports, marked Exhibits 5, 6, and 7, respectively, are made a part hereof by reference.

11. Plaintiff submitted to the defendant a voucher which was received in the State Office of the Agricultural Adjustment Administration, United States Department of Agriculture, on some date in April 1939 subsequent to April 17, in the amount of $1,377.40 covering the contact prints, photo-index maps and enlargements for Madison County. The defendant did not pay any part of said voucher but issued to plaintiff a "Difference Statement" dated May 11, 1939, which assessed liquidated damages for delay in the shipment of contact prints and photo-index maps for Madison County in the amount of $1,190, computed at the rate of $10 per day for 119 days (i. e., from 15 days after May 9, 1938, to September 20, 1938). The "Difference Statement" also assessed liquidated damages against plaintiff for delay in the shipment of contact prints and photo-index maps for Barrow County, Georgia, in the amount of $1,170, computed at the rate of $10 per day for 117 days (i. e., from 15 days after May 10, 1938, to September 19, 1938). The "Difference Statement" also credited the defendant with $13.77 as a prompt payment discount at the rate of one percent of the amount of said voucher. A copy of said voucher for $1,377.40 for Madison County is in evidence, marked Exhibit 8; and a copy of said "Difference Statement" is in evidence, marked Exhibit 9, and both are made a part hereof by reference.

12. Plaintiff submitted to the defendant a voucher which was received in the State Office of the Agricultural Adjustment Administration, United States Department of Agriculture, on May 2, 1939, in the amount of $1,825.95, covering the contact prints, photo-index maps and enlargements for Colorado County, Texas. The defendant paid plaintiff $811.32 on that voucher. The defendant issued to plaintiff a "Difference Statement" dated May 11, 1939, crediting the defendant with $996.37 as the unrecouped balance of the liquidated damages assessed against plaintiff for the late delivery of contact prints and photo-index maps for Madison County. That "Difference Statement" also credited the defendant with

$18.26 as a prompt payment discount at the rate of one percent of the amount of the voucher. That "Difference Statement" is in evidence marked Exhibit 10, and is made a part hereof by reference.

13. Plaintiff submitted to the defendant a voucher which was received in the State Office of the Agricultural Adjustment Administration, United States Department of Agriculture, on May 13, 1939, in the amount of $1,721.75, covering the contact prints, photo-index maps and enlargements for Jackson County. The defendant paid plaintiff $524.53 on said voucher by check dated June 3, 1939. The defendant issued to plaintiff a "Difference Statement" dated May 25, 1939, which assessed liquidated damages for delay in the shipment of contact prints and photo-index maps for Jackson County in the amount of $1,180, computed at the rate of $10 per day for 118 days (i. e., from 15 days after May 10, 1938, to September 20, 1938). That "Difference Statement" also credited the defendant with $17.22 as a prompt payment discount at the rate of one percent of the amount of the voucher. A copy of the voucher for $1,721.75 for Jackson County is in evidence, marked Exhibit 11, and is made a part hereof by reference. A copy of the "Difference Statement" is in evidence, marked Exhibit 12, and is made a part hereof by reference.

14. Plaintiff submitted to the defendant a voucher which was received in the State Office of the Agricultural Adjustment Administration, United States Department of Agriculture, on February 8, 1939, in the amount of $659.60, covering the contact prints, photo-index maps and enlargements for Barrow County. A copy of the voucher is Exhibit 18 and is made a part hereof by reference. The defendant paid plaintiff $653.00 on that voucher by check dated February 25, 1939.

15. The total amount of the prompt payment discounts taken by defendant in respect to the recouped liquidated damage for Barrow, Madison, and Jackson Counties is $35.40.

16. The defendant wrote to plaintiff a letter dated April 27, 1939, and in reply thereto plaintiff wrote to the defendant a letter dated May 8, 1939. Copies of these letters are Ex-

hibits 13 and 14, respectively, and are made a part hereof by reference.

17. By letters dated June 3, June 8, and August 9, 1939, plaintiff wrote to the Chief of Administrative Audit Section, Agricultural Adjustment Administration, United States Department of Agriculture, submitting his claim for the remission of the liquidated damages which had been assessed against him. The Department of Agriculture referred plaintiff's claim to the General Accounting Office for settlement.

18. On January 11, 1940, the General Accounting Office issued to plaintiff a settlement certificate rejecting his claim for the remission of liquidated damages. On January 23, 1940, plaintiff wrote to the Comptroller General requesting reconsideration of his claim. On October 30, 1940, the Comptroller General wrote to plaintiff again rejecting his claim. Copies of these letters are Exhibits 15, 16, and 17, respectively, and are made a part hereof by reference. The liquidated damages are still retained by the defendant.

19. The contracting officer did not make any findings in connection with any dispute arising under this contract and no appeal to the head of the department was taken from any such findings.

20. Two communications—

(a) A memorandum dated May 23, 1938 from Acting Secretary of Agriculture, W. R. Gregg, to the Administrator of the Agricultural Adjustment Administration; and

(b) An "Explanatory Statement" dated August 8, 1939 by Administrator R. M. Evans, of the Agricultural Adjustment Administration; which was transmitted by the Department of Agriculture to the General Accounting Office September 20, 1939,

are exhibits 19 and 20, respectively, and are made a part hereof by reference.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover liquidated damages assessed against him and withheld by the Government from pay-

ments which would otherwise have been due him. He made a contract with the Government to take aerial photographs of the land in three counties in Georgia, and to furnish contact prints, enlargements, photo-index maps, and negatives of these photographs, for the use of the Agricultural Adjustment Administration. The contract was a standard form Government supply contract which included the invitation to bid, the bid, the acceptance, the continuation schedule and the aerial photography specifications.

To perform the contract, the contractor had to provide the necessary airplanes and aerial cameras and take photographs of the land in each county. He would then develop the film and print "contact prints" from his negatives; arrange those prints so that an assembly of them would cover a given area of the land; photograph the assemblies of the prints to a smaller scale to make "photo-index maps"; submit the contact prints and photo-index maps to the Government for approval or for partial rejection which would require re-flying and re-photographing of some of the land, and the preparation of better photo-index maps; after approval, prepare enlargements of the maps on the basis of "ratio factors" to be furnished by the Government.

A pertinent part of the continuation schedule is quoted in finding 2. It says that "Contact prints and photo-index maps for each county project shall be shipped to the (specified office of the Government) within fifteen (15) calendar days after the date final flying is completed on said county unit."

The plaintiff did not ship these prints and maps until some four months after he had completed his original flying of each of the three counties. Liquidated damages at $10 a day for each county, the rate provided in the contract, if applicable, were assessed, which consumed nearly all that the plaintiff earned under the contract.

We have no doubt that the language of the contract quoted above obligated the plaintiff to develop his films, make his contact prints and photo-index maps of each county and ship them to the Government within fifteen days after he completed, to his own satisfaction, his flying and photo-

graphing of the land in that county. The plaintiff urges that because the words "final flying" are used, the sentence means rather that he must ship the prints and maps within fifteen days after he completes any further flying which might be required if the Government should reject as unsatisfactory the prints and maps which he submitted to them for approval or rejection. This is an impossible construction, since it would impose no duty on him to ship the materials until after he had shipped them and they had been inspected and approved or rejected. In short, it would mean that he was under no duty to ship them at all. The words "final flying" are not, in the context and circumstances, so clear and unambiguous that they compel an interpretation so destructive of an important part of the contract.

The plaintiff points us to paragraph 32 of the specifications which provides for liquidated damages of $10 a day for delay in "delivery after expiration of the time allowance specified in paragraphs 26 (a) and 27 hereof, and in the schedule of the advertisement * * *." All these provisions of the specifications are printed in finding 2. The fact that paragraph 32 speaks of "delivery" while the continuation schedule which was a part of the advertisement speaks of shipment, would not in itself trouble us. Shipment would amount to delivery if the contract said so, and if we found that the language of paragraph 32 was otherwise applicable, we would apply it.

But the plaintiff urges, and we agree, though with some doubt, that paragraph 32 is not otherwise applicable to delay in shipping prints and maps as required by the first sentence in the first paragraph of the part of the continuation schedule quoted in finding 2. Paragraph 32 provides for liquidated damages for "delay in undertaking the work and in delivery after expiration of the time allowance specified in paragraphs 26 (a) and 27 hereof, and in the schedule of the advertisement * * *" as follows:

Undertaking the work	$10
Contact prints with index maps	10
Oblique photographs	10
Ratioed prints	10
General enlargements	10

We look to paragraph 26 (a) of the specifications. It applies plainly to "undertaking the work", and refers to the advertisement. We look to paragraph 27, and its lettered subdivisions. Subdivision (a) is a substantial duplicate of the *second* sentence of the first quoted paragraph of the continuation schedule, except that it fixes the number of days merely by reference to the schedule. It clearly applies to the "final delivery" of the prints and maps after they have been submitted for approval, approved and returned to the contractor for enlargement. This sentence refers expressly to paragraph 27 (a) and, as we have said, 27 (a) in substance duplicates the sentence. Paragraph 27 (b), referred to in paragraph 32, clearly covers the same ground as the second quoted paragraph of the continuation schedule. It has to do with the delivery of enlargements. So we find that the references in paragraph 32 to "time allowances specified in paragraphs 26 (a) and 27 hereof and in the schedule of the advertisement" are completely fulfilled by time schedules set in the continuation schedule *and* in the specifications. Paragraphs 26 (a) and 27 say nothing about late delivery of original flying prints and maps. The omission is pointed, because the continuation schedule expressly refers, at the end of the second quoted sentence, and of the second paragraph, to the corresponding provisions of section 27, while at the end of the first sentence, the one here applicable, there is no such reference. The result is that the Government, either purposely or inadvertently, did not make the liquidated damages provision applicable to late shipment of the original prints. We would probably so conclude, as a matter of purely objective interpretation of language. If we give any heed at all to the idea that provisions for liquidated damages should be narrowly construed, we should hold, as we do, that there was no agreement for liquidated damages in the situation which occurred.

The Government urges that the negative provisions of paragraph 27 (d) (see finding 2) should create an implication that the liquidated damages provision covers the in-

stant situation. The argument is that since 27 (d) expressly provides that there should not be liquidated damages for the time between dates of delivery and dates of acceptance or rejection of, *inter alia*, contact prints with index maps, it implies that there may be liquidated damages before such delivery. There is some basis for such an implication, but it is by no means clear, since 27 (d) expressly limits its operation to situations coming "under the foregoing specifications." The delay with which we are concerned in this suit occurred at a stage not adverted to at all in the specifications, but only in the continuation schedule. We ought not to base a provision for liquidated damages upon an implication, unless the implication is plain.

The express mention of "contact prints with index maps" as the subject of liquidated damages in paragraph 32 is fulfilled by their express mention, in the connection discussed above and not applicable to our facts, in the second sentence of the continuation schedule and in 27 (a) of the specifications.

The plaintiff may recover $3,575.40. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ALCEA BAND OF TILLAMOOKS; YAH-QUO-NAH BAND OF TILLAMOOKS; SELETCA BAND OF TILLAMOOKS; NE-A-CHES-NA BAND OF TILLAMOOKS; UMP-QUA TRIBE; QUANS-SAKE-NAH, KLEN-NAH-HAH, AND KE-AH-MAS-E-TON BANDS OF NAS-O-MAH OR COQUILLE TRIBE; KO-SE-E-CHAH BAND OF TOO-TOO-TO-NEYS, SE-QUA-CHEE BAND OF TOO-TOO-TO-NEYS, TOO-TOO-TO-NEY BAND OF TOO-TOO-TO-NEYS; CHET-CO TRIBE; YAH-SHUTE BAND OF TOO-TOO-TO-NEYS; WHIS-TO-NATIN BAND OF TOO-TOO-TO-NEYS; COS-SA-TO-NY BAND OF TOO-TOO-TO-NEYS; CHET-LESS-ING-TON BAND OF TOO-TOO-TO-NEYS; PORT ORFORD BAND OF TOO-TOO-TO-NEYS; EUKIE-CHEE BAND OF TOO-TOO-TO-NEYS; KUS-SO-TO-NY BAND OF TOO-TOO-TO-NEYS; KLER-IT-LA-TEL BAND OF TOO-TOO-TO-NEYS; TE-CHA-QUOT BAND OF TOO-TOO-TO-NEYS; MACK-A-NO-TIN BAND OF TOO-TOO-TO-NEYS; CAH-TOCH, CHIN-CHEN-TEN-TAH-TA, WHISTON, AND KLEN-HOS-TUN BANDS OF COQUILLES; CHINOOK TRIBE; CLATSOP TRIBE; NE-HA-LUM TRIBE; CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY, OREGON; WILLAMETTE VALLEY CONFEDERATED TRIBES OF INDIANS; SILETZ CONFEDERATED TRIBES OF INDIANS; AND PORTIONS AND DESCENDANTS OF ALL SUCH TRIBES AND BANDS

v.

THE UNITED STATES

[No. 45230. Decided April 2, 1945. Defendant's motion for new trial overruled June 4, 1945.]*

On the Proofs

Indian claims; suit under special jurisdictional act; petition as to certain plaintiffs dismissed.—Where plaintiffs brought suit under clause (b) of the special jurisdictional act of August 26, 1935 (49 Stat. 801) upon claims arising under or growing out of the original Indian title, claim or rights in, to or upon lands occupied by Indian tribes and bands described in the unratified treaty dated August 11, 1855, published in Senate Executive Ducument No. 25, 53rd Congress, first session, page 815, it is *held* that the allegations of the petition are not sufficient under the terms of the jurisdictional act and the rules of the Court of Claims to constitute a cause of action against the United States by the Umpqua, Chinook, Clatsop, and Ne-ha-lum tribes, the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians; and the petition as to these tribes is dismissed.

*Defendant's petition for writ of certiorari granted.

Syllabus

Same.—Notwithstanding the defect in the petition, it is further *held* that the evidence submitted is not sufficient to show that any of the named seven tribes has a legal or equitable claim for compensation against the United States.

Same; conditional reservation under Executive Order.—The Executive Order of November 9, 1855, under which there was set aside for the Indians the "Coast Reservation," consisting of an area 120 miles north and south along the coast of Oregon by 20 miles east and west, was a conditional reservation or a withdrawal of public land from white settlement, subject to further curtailment or reduction if found proper by the President or to entire withdrawal as a reservation for Indians should Congress not sanction, as advisable, the purpose of the reservation.

Same; no recovery where conditional reservation was diminished.—Where it is shown by subsequent actions, by the President in the Executive Order of December 21, 1865, and by Congress in the Acts of March 3, 1875 (18 Stat. 420), February 8, 1887 (24 Stat. 388), August 15, 1894 (28 Stat. 286, 323), and May 13, 1910 (36 Stat. 367), that the President and the Congress at all times until 1894 regarded the original "Coast Reservation" described by the Executive Order of November 9, 1855, as a conditional or temporary reservation for Indian purposes; it is *held* that none of the plaintiff tribes or bands placed on the Coast Reservation, including the Tillamook Tribe, became entitled, under the Executive Order of November 9, 1855, to recover compensation, as for a taking of land to which they had exclusive use and occupancy title under approval and recognition by Congress, when the "Coast Reservation," as originally defined by the 1855 Executive Order, was subsequently in 1865 and 1875 curtailed or diminished. *Sioux Tribe of Indians*, 94 C. Cls., 150; affirmed 316 U. S. 317.

Same; recognition of Coast Reservation by Congress; land not taken without compensation.—Where by the enactment of section 15 of the Act of August 15, 1894 (28 Stat. 286, 323, 324), approving an agreement ceding 178,840 acres for $142,600, Congress then and thereafter approved and recognized the Coast Reservation as it existed immediately prior thereto as beneficially belonging to the Indians thereon; and where thereafter Congress did not take any part of the reservation without compensation; it is *held* that the Umpqua, Chinook, Clatsop and the Ne-ha-lum tribes and the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians are not entitled to recover.

Same; Umpqua Tribe excluded under Jurisdictional Act.—Further, the Umpqua Tribe is not entitled to recover because it is expressly excluded under clause (b) of the Jurisdictional Act.

Same; certain unratified treaties not included under Jurisdictional Act; acceptance of certain payments as full settlement of claims.—The Chinook, Clatsop and Ne-ha-lum tribes are not entitled to recover as for a taking of lands to which they may have had original Indian title for the further reason that their unratified treaties made in 1851 are not included in the Jurisdictional Act, and also for the reason that under the Acts of June 7, 1897 (30 Stat. 62) and August 24, 1912 (37 Stat. 518,535) they were paid various sums by Congress which were accepted by them in full of all demands or claims against the United States. *Klamath and Moadoc Tribes of Indians, et al* v. *United States*, 81 C. Cls. 79, affirmed 296 U. S. 244, cited.

Same; Willamette Tribe not placed on Coast Reservation.—The Willamette Tribe of Indians, included in the petition, were not brought to or placed upon the Coast Reservation, and they cannot, therefore, sue under clause (a) or (b) of the Jurisdictional Act or under the Executive Order of November 9, 1855.

Same; consent to be sued on original Indian title; occupancy a question of fact.—Where consent to be sued on the basis of original Indian title has been given by Congress, as in the instant case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is "a question of fact to be determined as any other question of fact." *United States, as Guardian of the Hualpai Indians of Arizona*, v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, cited. Cf. *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347; *Coos Bay, Lower Umpqua* and *Siuslaw Indian Tribes* v. *United States*, 87 C. Cls. 143.

Same; consent to be sued on treaty rights; occupancy and use acknowledged.—Where consent to be sued has been given by Congress limited to a claim, or claims, arising under or growing out of a treaty, agreement or act of Congress, proof of aboriginal use and occupancy title is not necessary when such treaties, agreements or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been, or is, set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476.

Same; consent to be sued on claim arising out of treaty of peace and amity.—Where the consent to be sued is limited to a claim, or claims, arising out of a treaty which is only a treaty of peace and amity, and which does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the Court of Claims is without authority to determine, adjudicate and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530; *Crow Nation* v. *United States*, 81 C. Cls. 238; 269 U. S. 281; *Wichita Indians* v. *United States*, 89

Syllabus

C. Cls. 378; *Northwestern Bands* v. *United States*, 95 C. Cls. 642, affirmed 324 U. S. 335.

Same; limitation on right to sue on treaty rights.—Where the right to sue is limited to a claim, or claims, arising out of a treaty, or treaties, even if the proof is sufficient to show that the tribe, or tribes, concerned had original Indian title, through use and occupancy to the exclusion of other Indian tribes, the court cannot enter judgment on the basis of such original title. *Northwestern Bands* v. *United States*, 95 C. Cls. 642; affirmed 324 U. S. 335.

Same; recognition of Indian rights.—The United States has always recognized that the Indians had a beneficial ownership in lands exclusively occupied by them. *Johnson and Graham's Lessee* v. *William M'Intosh*, 8 Wheat. 543; *Cramer et al* v. *United States*, 261 U. S. 219; *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339.

Same; ordinary rules of law and equity govern rights of parties.—The United States possessed the power to take possession of Indian lands, whether justly or unjustly, but where, as in the instant case, Congress has given the consent of the United States to be sued on claims for compensation based on aboriginal title to lands taken by the United States, ordinary principles of law and equity, so far as applicable, govern the rights of the parties.

Same; recovery allowed to certain plaintiffs on original Indian title.—Upon the evidence submitted it is *held* that the plaintiffs Tillamook, Coquille, Too-too-to-ney and Chetco tribes have satisfactorily established original Indian title, through exclusive use and occupancy in 1855, and long prior thereto, to the lands described in the findings; and that they are entitled, as a matter of law, to recover compensation for the lands of which they were deprived, and which were taken by the United States without payment therefor.

Same; date of taking certain lands belonging to Tillamook tribe.—The bands composing plaintiff Tillamook tribe were not altogether moved off their land in 1855, but they were then moved and confined to the conditional reservation, along with other Indian tribes and bands; and such of the land of the Tillamook tribe as lay east of the eastern boundary of this conditional reservation was taken November 9, 1855, by the Executive Order of that date, which together with the actions of the defendant's representatives in executing it, was ratified and confirmed by the Act of March 3, 1875 (18 Stat. 420).

Same; date of original taking of lands beneficially belonging to Tillamooks, Coquilles, Too-too-to-neys and Chetcos.—The actions of the officers of the Government, dating from November 9, 1855, in carrying out the Executive Orders of 1855 and 1865, were ratified and confirmed by the Act of March 3, 1875 (18 Stat. 420); thus confirming as of November 9, 1855, the original taking of the lands beneficially belonging, by original Indian title, to the

tribes and bands of Tillamooks, Coquilles, Too-too-to-neys and Chetcos. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476, and 85 C. Cls. 331; 304 U. S. 111.

Same; measure of compensation; offsets.—The compensation to which the Indians are entitled is to be measured by the value of the lands described in the findings as of November 9, 1855, plus an additional amount measured by a reasonable rate of interest to make just compensation but these four tribes are not legally and equitably entitled to recover the entire value of the lands since this amount must be offset as of November 9, 1855, by the values as of that date of their respective interests in the land comprising the reservation on August 15, 1894, of which interests these tribes then became the beneficial owners through the recognition by Congress in the enactment of the Act of August 15, 1894.

Same; Tillamooks not deprived of use in 1855.—The Tillamooks originally held Indian title to their interest in the reservation as it existed in 1894 and such title had been taken in 1855 but they were not deprived of possession to the extent of that interest, and their exclusive use and occupancy title to such interest again became vested and determinable in 1894.

Same; rights of Coquilles, Too-too-to-neys and Chetcos.—The lands of the Coquilles, Too-too-to-ney and Chetco tribes were taken when they were entirely moved off, on or about November 9, 1855, and placed on a portion of the land to which the tribe and bands of Tillamooks held original title; and their exclusive use and occupancy interests in the reservation, which became vested by recognition in the Act of August 15, 1894 (28 Stat. 286), represented an equitable consideration in part for their lands taken in 1855.

Same; further proceedings under rule 39 (a).—Judgments for the amount of compensation to which plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys and Chetcos may be entitled, under the opinion of the court, and the determination of the amount of offsets, in addition to those mentioned in the opinion, if any, are reserved for further proceedings under rule 39 (a) of the Court of Claims.

The Reporter's statement of the case:

Mr. Everett Sanders for plaintiffs.

Mr. John G. Mullen, *Mr. E. L. Crawford*, *Mr. L. A. Gravelle*, *Mr. Douglas Whitlock*, and *Mr. Edward F. Howrey* were on the brief.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for defendant.

Mr. Raymond T. Nagle was on the brief.

Plaintiffs bring this suit under clause (b) of the special jurisdictional act, hereinafter mentioned, to recover compensation for certain lands on the coast of Oregon to which certain of plaintiff tribes who were parties to an unratified treaty dated August 11, 1855 claim they had original Indian title through exclusive possession and occupancy from time immemorial, which lands were taken in 1855 and subsequently by the United States without payment of just compensation.

The provision of the jurisdictional act under which this suit is brought authorizes the bringing of suit and the entry of judgment for compensation if the claim of original Indian title by occupancy at and long prior to the date of the unratified treaty of August 11, 1855 is established.

It is admitted by defendant that certain plaintiff tribes and bands who were parties to the unratified treaty of 1855 were moved off and deprived of the use and occupancy of the lands which they claimed in 1855 and were placed on certain land, a portion of which was and is claimed by the Tillamooks Tribe. This land consisted of a reservation carved out of the entire area described in said treaty of 1855 as being ceded, but it is contended by defendant that such of plaintiff tribes or bands who were parties to the unratified treaty of 1855 whose lands were included in the terms thereof are not entitled to recover compensation. It is insisted

(1) That the tribes and bands who are entitled under the terms of the jurisdictional act to maintain this suit have not proven by sufficient evidence that they exclusively occupied and used the area for which they now claim compensation, or any definite part thereof, at and long prior to 1855.

(2) That they cannot recover on the basis of original title, claim, or rights in, to, or upon the whole or any part of the lands for which they make claim in the absence of a showing of prior recognition or approval by Congress as against the sovereign rights of the United States of such original Indian title, which title, it is contended, was never recognized by Congress as to these plaintiffs, or any of them; and

(3) That certain of the tribes and bands made plaintiffs herein were not parties to the treaty of 1855, and that certain

of the tribes and bands, made plaintiffs in the petition, who were parties to certain unratified treaties made in 1851 have been paid by Congress under the acts of June 7, 1897 and August 24, 1912 in full for their claims in respect of the lands which they claimed had been taken.

Counsel also contend that the "Coast Reservation", consisting of about 1,100,000 acres as created by an Executive Order of November 9, 1855, was a conditional reservation for Indian purposes through a withdrawal of lands from public use and settlement and not a permanent Indian reservation, as originally created, for the sole and exclusive use and occupancy of any of plaintiff tribes or other Indians through a ratified treaty, agreement, or act of Congress, such as would give any of plaintiffs beneficial ownership thereto, for their exclusive occupancy and use, and render the United States liable for compensation as a result of subsequent reductions or diminution of the temporary reservation so created.

Plaintiffs, the Tillamook, Coquille, Too-too-to-ney, and the Chetco tribes who were parties to the unratified treaty of August 11, 1855, who have never been paid and who are entitled to maitain this suit under clause (b) of the jurisdictional act, insist that they have established original Indian title through exclusive use and occupancy of the lands within areas herein claimed by them, which lands were included in the total area described in the unratified treaty of 1855. They further insist that no specific act of Congress directly recognizing their original Indian title is necessary to be shown as a condition to their right to recover under the terms of the jurisdictional act, and that the United States under its long-established Indian policy adopted by Congress had, long prior to 1855, and did then recognize such original Indian title and rights in lands used and exclusively occupied by the Indian tribes, including plaintiffs, and that such original Indian title of these particular plaintiffs was never legally extinguished; they, therefore, insist that they are entitled to just compensation under the jurisdictional act for the lands to which they had original use and occupancy title which, they contend, were taken by the Government in 1855.

The only question now before the court is the legal and equitable right of plaintiffs under the provisions of the jurisdictional act and the evidence to recover compensation (1) on the basis of original Indian title for the lands claimed, and (2) on the basis of alleged exclusive use and occupancy rights in and to certain portions of the land originally included within the "Coast Reservation"; the amount of recovery and the amount of offsets, if any, being reserved for further proceedings under rule 39 (a).

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Clause (b) of the special jurisdictional act under which this suit was brought confers upon this court jurisdiction to hear, adjudicate, and render final judgment in and upon "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described" in the unratified treaty of August 11, 1855, "at and long prior to the dates thereof." Certain tribes, which also signed this unratified treaty of 1855, but which are not parties to this suit, were expressly excluded by the jurisdictional act because separate provisions had been made by Congress with respect to their claims. The Indians so excluded were the Coös Bay, Lower Umpqua, and Siuslaw tribes. Certain other tribes and bands made plaintiffs in the petition herein who were not parties to the unratified treaty of 1855, and who the defendant contends are not entitled to maintain suit or to recover under the terms of the jurisdictional act, will be referred to hereinafter.

2. March 3, 1847 (9 Stat. 203), Congress passed an act to amend the act of June 30, 1834 (4 Stat. 735), "for the organization of the Department of Indian Affairs," and to amend an act of the same date (4 Stat. 729) "to regulate trade and intercourse with the Indian tribes," in section 1 of which act of 1847 it was provided "That the limits of each superintendency, agency, and subagency shall be established by the Secretary of War, either by tribes or geographical bound-

aries; and the superintendents, agents, and subagents shall be furnished with offices for the transaction of the public business, and the agents and subagents with houses for their residences, at the expense of the United States * * *." By the act of August 14, 1848 (9 Stat. 323) Congress created the territory of Oregon, within the area of which lived various Indian tribes in addition to plaintiff tribes and bands, and there was inserted in sec. 1 of that act the provision that nothing therein contained "shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed." This provision was made applicable to all territories and territorial governments which embraced Indians (R. S. 1839, 1840).

June 5, 1850 (9 Stat. 437), Congress passed an act entitled "An act authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains, and for other purposes." Sec. 1 of this act authorized the President to appoint one or more commissioners to negotiate treaties with the several tribes for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if practicable, for their removal east of said mountains. The President was also directed to obtain their assent and submission "to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories * * *." Sec. 2 authorized the appointment, by and with the advice and consent of the Senate, of a superintendent of Indian Affairs for the Territory of Oregon to exercise a general superintendence over all Indians in Oregon and to exercise and perform all powers and duties assigned by law to other Indian superintendents. Sec. 4 authorized the President, by and with the advice and consent of the Senate, to appoint

one or more Indian agents, not exceeding three, to perform all the duties as its agent to such tribe or tribes as should be assigned to him by the superintendent at the direction of the President. Sec. 5 provided "That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon." Sec. 6 appropriated $25,000 to carry into effect the provisions of the act. Subsequent appropriations were made from time to time to carry out the provisions of the act and, also, for expenses of negotiating and making treaties with the Oregon Indians for extinguishment of their claims to lands.

The superintendent and agents were forthwith appointed. Anson Dart was appointed Indian superintendent and was later succeeded by General Joel Palmer. Thereafter, under authority, direction, and instructions of the Congress and the President, Dart and Palmer negotiated various treaties in 1851 and subsequently with various tribes and bands of Indians in Oregon, including the unratified treaty of August 11, 1855 made by General Palmer with certain of plaintiff tribes and bands for extinguishment of original Indian title to lands claimed and occupied by them. The Indian tribes, parties to this treaty of 1855, were the tribes and bands of Tillamooks, the Sinslaw or Siuslaw, the Umpqua, the Kowes Bay or Coos Bay, the Coquille or Nas-o-mah, the Too-too-to-ney, and the Chetco.

Prior to the negotiation and signing of the treaty of August 11, 1855, nineteen separate treaties had been negotiated and made in 1851 with various tribes and bands of Indians, including the Tillamook (North), not plaintiff Tillamooks tribe; the Clatsop (plaintiff herein); the Neha-lum (plaintiff herein), and various bands of the Chinook tribe (also a plaintiff herein).

Six other treaties were negotiated, made, and signed in 1853, 1854, and 1855 by Commissioner Anson Dart or by Gen. Palmer, assisted by the Indian agents, with the various tribes and bands named therein, for extinguishment of Indian claims of original Indian titles. These six treaties referred to in clause (a) of the jurisdictional act were rati-

fied. None of the claims made in this suit is directly based on those treaties.

The unratified treaty of August 11, 1855, with which we are here concerned and which, as hereinafter stated, was not submitted to the Senate until February 11, 1857, was not rejected by the Senate but was simply not reported out by the Committee on Indian Affairs to which it had been referred. Apparently the reason this treaty of August 11, 1855, and certain treaties made with various tribes and bands in 1851 were not reported out by the Senate Committee for action by the Senate was because the August 11, 1855, treaty described the land to be ceded as overlapping at the north portion certain land claimed by the North Tillamooks, Chinook, Clatsop, and Ne-ha-lum tribes who did not sign the 1855 treaty and with whom a separate treaty in 1851 had been negotiated and signed; and, also, because certain other treaties negotiated and signed in 1851 with certain other tribes and bands were in effect superseded by subsequent treaties made with some of the same tribes and bands in 1853, 1854, and 1855, which subsequent treaties had been ratified.

Seven of the tribes and bands with whom treaties had been made in 1851, but which were not ratified, and with which tribes no subsequent treaty was made and ratified, were, by the acts of June 7, 1897, 30 Stat. 62, and August 24, 1912, 37 Stat. 518, 535, paid for their claims to lands of which they had been deprived as a result of the nonratification of the 1851 treaties with them. These particular lands had been described in seven separate unratified treaties, and the amounts so paid by these acts of Congress were, pursuant to the provisions of the acts, accepted by said tribes and bands in full satisfaction of all claims for the lands described in and ceded by said 1851 unratified treaties. The other twelve tribes and bands with whom treaties were made in 1851, but not ratified, appear to have been included in other treaties negotiated, made, and ratified, as above mentioned, in 1853, 1854, and 1855.

The seven tribes and bands whose treaties of 1851 were not ratified and who were not included in other ratified treaties were as follows:

Tribe	Date of Treaty in 1851
Clatsop tribe	August 5
North Tillamook tribe, including the Ne-ha-lum tribe (not plaintiff Tillamooks)	" 7
Nuc-quee-clah-we-muck band of Chinook tribe	" 7
Kathlamet band of Chinook tribe	" 9
Waukikum " " " "	" 8
Wheelappa " " " "	" 9
Lower " " " "	" 9

3. Congress enacted provisions from time to time and made various appropriations to carry out and fulfill ratified treaties made by Anson Dart, Gen. Palmer, and others with various tribes of Oregon Indians (some of whom are plaintiffs herein) for the extinguishment by cession to the United States of their claims of original use and occupancy title to lands. Some of those ratified treaties were (1) Treaty of September 10, 1853 (10 Stat. 1018), with the Rogue River Tribe; (2) Treaty of September 19, 1853 (10 Stat. 1027), with the Umpqua Tribe; (3) Treaty of November 18, 1854 (10 Stat. 1122), with the Chasta tribe, the Scotons tribe, and the Grave Creek band of Umpquas; (4) Treaty of November 29, 1854 (10 Stat. 1125), with "the confederated bands of the Umpqua tribe of Indians and of the Calapooias residing in Umpqua Valley"; (5) Treaty of January 22, 1855 (10 Stat. 1143), with "the confederated bands of Indians residing in the Willamette Valley"; and (6) Treaty of December 21, 1855 (12 Stat. 981), with the "Mo-lal-la-las, or Molel tribe of Indians."

None of the unratified treaties mentioned in finding 2, made in 1851, including those made in that year with the seven bands and tribes who were paid in full, as above-mentioned, and none of the above-mentioned six ratified treaties included, as ceded land, any of the land for which compensation is claimed in the petition herein by plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos.

All the above-mentioned ratified treaties except the sixth had been made and ratified before the treaty of August 11, 1855, with which we are here concerned, was transmitted by the President to the Senate and before the President issued

the Executive Order of November 9, 1855, hereinafter mentioned, conditionally creating the Coast Reservation in part out of certain lands involved in this case and ceded under the August 11, 1855 unratified treaty. The reservation was created, subject to future curtailment if the President should deem proper, for the Indian tribes and bands party to the 1855 treaty and other tribes and bands which the President might place upon said reservation.

As hereinafter mentioned, it appears that some of the Indians of some of the above-mentioned tribes and bands whose treaties were ratified were subsequently removed to and placed upon the reservation described in the Executive Order of November 9, 1855, notwithstanding the treaty of August 11, 1855 with the Indians, who claimed and held original Indian title to such lands had not been ratified, and such original Indian title had not been legally extinguished.

Gen. Palmer, assisted by the Government Indian agents, made investigations and reports as to the lands and areas thereof claimed, occupied, and used by plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos, parties to the unratified treaty of August 11, 1855. Plaintiff tribes and bands, except those mentioned in finding 5, signed and accepted this treaty dated August 11, 1855 on August 11, August 17, August 23, August 30 and September 8, 1855; because of these different dates of signing by the different tribes, the jurisdictional act referred to the 1855 treaty as "treaties." So far as here material, the unratified treaty of August 11, 1855, was as follows:

> ARTICLE 1. The above-named confederated bands of Indians cede to the United States all their right, title, and interest to all and every part of the country claimed by them included in the following boundaries, to wit: Commencing in the middle of the channel of the Columbia River, at the northwestern extremity of the purchase made of the Calapooia and Molalla bands of Indians; thence running southerly with that boundary to the southwestern point of that purchase, and thence along the summit of the Coast Range of mountains with the western boundaries of the purchase made of the Umpquas and Molallas of the Umpqua Valley, and of the Scotons, Chastes, and Grave Creeks of Rogue River Valley, to the southern boundary of Oregon Territory;

thence west to the Pacific Ocean, thence northerly along said ocean to the middle of the northern channel of the Columbia River; thence following the middle of said channel to the place of beginning: *Provided, however*, That so much of the country described above as is contained in the following boundaries shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, and such other bands or parts of bands as may, by direction of the President of the United States, be located thereon.

Such tract for the purpose contemplated shall be held and regarded as an Indian reservation, to wit: Commencing where the northern boundary of the seventeenth range of townships south of the base line strikes the coast; thence east to the western boundary of the eighth range of townships west of the Willamette meridian, as indicated by John B. Preston's "Diagram of a portion of Oregon Territory;" thence north on that line to the southern boundary of the third range of townships south of the base line; thence west to the Pacific Ocean; and thence southerly along the coast to the place of beginning: *Provided, however*, That the district west of the said eighth range of townships, between the said northern boundary of range seventeen and the fourth standard parallel south, shall, for the term of twenty years, be held and regarded as a part of said Indian reservation, and together with the tract described by this section, as such, be subject to the laws regulating "trade and intercourse with Indian tribes" now in force, or hereafter enacted by the Congress of the United States. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use of such Indians as are, or may hereafter be, located thereon; nor shall any person other than an Indian be permitted to reside upon the same without the consent and permission of the Superintendent of Indian Affairs and the agent having charge of said district.

The said bands and tribes agree to remove to and settle upon the same within one year after the ratification of this convention without any additional expense to the Government other than is provided by this treaty; and until the expiration of the time specified the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all white citizens the right to enter upon and occupy as settlers any lands not included in said reservation, or actually enclosed by said Indians; *Provided, however*, That, when

the public interest or convenience may require, the right of constructing roads, railroads, or other public highways, and navigating the streams or bays in said reservation, is hereby secured to the United States; *And provided also*, That if any band or bands of Indians residing in and claiming any portion of the country herein described shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such part of the several annuities and other payments hereinafter named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid as consideration and payment in full for the tracts in said country claimed by them; *And provided also*, That where substantial improvements have been made by individuals of bands becoming parties to this treaty which they shall be compelled to abandon in consequence of said treaty, the same shall be valued under direction of the President of the United States, and payment made said individuals therefor, or, in lieu thereof, improvements of an equal extent and value, at their option, shall be made on the tracts assigned to each respectively.

ARTICLE 2. In consideration of and payment for the country hereby ceded, the United States agree to pay to the bands and tribes of Indians claiming territory and residing in said country the several sums of money, to wit: Ten thousand dollars per annum for the first three years, commencing on or before the first day of September, 1857; eight thousand dollars per annum for the term of three years next succeeding the first three; six thousand dollars per annum for the term of three years next succeeding the second three, and three thousand dollars per annum for the term of six years next succeeding the third three.

All of which several sums of money shall be expended for the use and benefit of the confederated bands, under the direction of the President of the United States, who may from time to time, at his discretion, determine what proportion thereof shall be expended for such objects as, in his judgment, will promote their well-being and advance them in civilization; for their mutual improvement and education; for buildings, opening and fencing farms, breaking land, providing teams, stock, agricultural implements, seed, &c., for clothing, payment of mechanics and farmers, and for arms and ammunition.

ARTICLE 3. The United States agree to pay said Indians the additional sum of thirty thousand dollars, a

portion whereof shall be applied to the payment for such articles as may be advanced them at the time of signing this treaty, and in providing, after the ratification thereof, and prior to their removal, such articles as may be deemed by the President essential to their wants; for the erection of buildings on the reservation, fencing and opening farms; for the purchase of teams, farming implements, tools, and seeds; for the payment of employees, and for subsisting the Indians the first year after their removal.

ARTICLE 4. In addition to the consideration specified, the United States agree to erect at suitable points on the reservation two sawmills, two flouring mills, four schoolhouses, and two blacksmith shops, to one of which shall be attached a tin shop; and for two sawyers, two millers, one superintendent of farming operations, three farmers, one physician, four school teachers, and two blacksmiths, a dwelling house and the necessary outbuildings for each; and to purchase and keep in repair, for the time specified for furnishing employes, all necessary mill fixtures, mechanical tools, medicines, books, and stationery for schools, and furniture for employes.

The United States further engage to secure and pay for the services and subsistence for the term of fifteen years, of three farmers, two blacksmiths, two sawyers, two millers; and for the term of twenty years, of one physician, one superintendent of farming operations, and four school teachers.

The United States also engage to retain in the service one Indian agent, and to erect at the most central suitable point agency buildings, where such agent shall reside.

ARTICLE 8. The confederated bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned; or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians, except in self-defense, but submit all matters of difference between them and other Indians to the Government of the United States, or its agents, for decision, and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail as

that prescribed in the case of depredations against citizens.

ARTICLE 9. For the purpose of establishing uniformity of laws, rules, and regulations among the various bands of Indians being parties to this treaty, and to give greater security to person and property, it is hereby agreed that the Congress of the United States, with the approval of the President, shall have power to enact laws for the government of said Indians.

ARTICLE 11. The United States agree to expend a sum of money, not exceeding ten thousand dollars, in opening and constructing wagon roads between the different settlements on said reservation, and from the saw and flouring mills herein provided for to said settlements; and in the event of a failure to effect secure landings for vessels in the transportation of annuity goods within said reservation, the additional sum, not exceeding ten thousand dollars, shall be expended by the United States in opening and constructing a wagon road from some point at or near the mouth of Ne-aches-na or Salmon River to the settlements in the Willamette Valley, and one wagon road from some navigable point on Yah-quo-nah or Alcea River to the valley of the Willamette.

ARTICLE 12. The United States engage to establish and maintain a military post on said reservation whensoever the peace and safety of the Indians residing thereon shall render the same necessary.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

4. Plaintiff tribes and bands (except the plaintiffs Chinook, Clatsop, and the Ne-ha-lum tribes, the Confederated tribes of the Grand Ronde Community, Oregon, so-named, Willamette Valley Confederated tribes of Indians, so-named, and the Siletz Confederated tribes, so-named) were parties signatory to the unratified treaty above set out and signed by the chiefs and headsmen of the tribes and bands as set out therein, respectively. The treaty was signed by Joel Palmer, duly authorized by the President of the United States on behalf of the Government of the United States. It was forwarded to the office of the Commissioner of Indian Affairs, Interior Department, by Superintendent Palmer on November 14, 1855, but was not transmitted by the Commis-

sioner of Indian Affairs to the Secretary of the Interior for submission to the President until February 5, 1857. The reason for this delay from November 14, 1855, to February 5, 1857, was that this treaty of August 11, 1855, with numerous other treaties negotiated and made with the various tribes and bands of Indians in Oregon, was received by the Commissioner of Indian Affairs during a recess of Congress—which treaties were afterwards withheld by the Commissioner of Indian Affairs because of the hostile condition of the Government's relation with certain Indians in that country, which, however, was not caused by plaintiff Indians. Due to the intrusion and conduct of certain white settlers, and the resentment thereof by certain Indians, there were open hostilities with the Rogue River Indians, a great many of whom were exterminated. A great many of the other Rouge River bands of Indians were driven from their homes into the mountains, but after hostilities ceased they were rounded up and permanently placed upon the Coast Reservation, hereinafter mentioned, created in part out of the land claimed by plaintiff Tillamooks tribe. A great many of these Rogue River Indians died of disease contracted from exposure during this period. When various other treaties which had been negotiated, made, and executed by Anson Dart, Gen. Palmer, and others with various tribes and bands of Indians were finally sent by the Commissioner of Indian Affairs to the Secretary of the Interior, and, by him, to the President, who transmitted them to the Senate for ratification, the treaty of August 11, 1855 with certain plaintiff tribes and bands was accidentally and unintentionally overlooked and not sent along with the other treaties. Some of the treaties transmitted at that time for ratification appear to have been those made in 1853, 1854, and 1855, mentioned in clause (a) of the jurisdictional act, certain of which tied in with the Coast Reservation defined and sought to be created by art. 1 of the unratified treaty with certain plaintiff bands and tribes of August 11, 1855, and as described in the Executive Order of November 9, 1855, hereinafter referred to.

The 1855 treaty and the original papers, including the instructions to and the reports from Gen. Palmer as appear from the Journal of the Senate, were sent to the Senate by

the President February 11, 1857; on February 18 the treaty was read and referred to the Committee on Indian Affairs. The treaty was not reported out by the committee and Congress adjourned shortly after the treaty was submitted; it was never acted upon by the Senate, as shown by Senate Executive Document No. 25, 53rd Cong., 1st sess., referred to in clause (b) of the jurisdictional act herein.

At the next session of Congress this treaty of August 11, 1855, and certain other treaties which had been negotiated and made in 1851, were not reported by the Indian Affairs' Committee to the Senate for consideration, apparently for the reasons hereinbefore mentioned, and these treaties were never thereafter acted upon by the Senate.

5. Prior to execution of the treaty of 1855, and after Joel Palmer became superintendent of Indian Affairs in Oregon, he was duly authorized and directed by the President to draft and negotiate treaties for the purpose of extinguishing the Indian title to lands in Oregon Territory, including the lands described in the unratified treaty of 1855, with certain of plaintiff tribes and bands. Palmer was notified of his appointment by the Commissioner of Indian Affairs August 12, 1854, and in the performance of such duties and functions, and by direction of the President, through the Bureau of Indian Affairs, it became and was his duty to investigate and ascertain the location of the several Indian tribes and bands who occupied and held possession of lands, the areas thereof and the nature and extent of such occupancy and use, and to secure the signatures of the tribes and bands of Indians who owned and occupied the lands and held the original Indian title sought to be extinguished. This he did with care and thoroughness.

In the notice of his appointment, transmitted by the Commissioner of Indian Affairs, Gen. Palmer was advised that "You will furnish me with a skeleton map of Oregon Territory showing the location of the different tribes, with the extent of territory claimed by each and the nature or tenure of the claim and as treaties are made designate the reserve provided for Indian use with such precision that it may be laid down on the map here." .

In further carrying out his instructions and duties Palmer made an extended trip, or trips, over the land described in the treaty of August 11, 1855, assisted by Oris Taylor and J. L. Parrish, Indian Agent, Port Orford District, and thus obtained the added store of information required by the Bureau of Indian Affairs. The Port Orford District, of Which J. L. Parrish was the duly appointed Indian agent, was located on the coast of southern Oregon in the area of the lands occupied and held by the Indians of the Coquille, the Too-too-to-ney, and the Chetco tribes. Gen. Palmer accumulated and submitted detailed data of the geographical location and names of the tribes and bands; and submitted definite boundaries of the lands of plaintiff tribes and bands of the Tillamooks, Too-too-to-neys, Coquilles and Chetcos who were parties to the treaty of August 11, 1855, in the form of a written report to the Commissioner of Indian Affairs, accompanied with a detailed report from J. L. Parrish, Indian agent, in which was set out the location of the various tribes and bands of Indians.

The Too-too-to-ney, the Chetco, and the Coquille tribes are described in the Palmer report as occupying "That part of Oregon south of the waters of Coos Bay and west of the Summit of the Coast Range of Mountains."

The Palmer report further stated:

> A detailed statement of Indian affairs in the Port Orford district will be found in the accompanying report of Agent Parrish. He enumerates twelve distinct bands, with an aggregate population of 1,311 souls, and includes them all in the Too-ton-ton [Too-too-to-ney] tribe. These bands, however, speak at least four distinct languages, and but few in each band can converse with those of another. Those grouped as one band often reside in several villages. These bands are scattered over a great extent of country—along the coast and along the streams from the California line to 20 miles north of the Coquille [region], and from the ocean to the summit of the Coast Range of mountains. I visited several bands in person, and directed Mr. Taylor to accompany and assist the agent [Parrish] in ascertaining the numbers of the remainder. Excepting the Chetcas [Chetcos] and Coquilles, I found these Indians at peace with the whites and among themselves. They are will-

ing the whites should occupy their lands, provided they are permitted to retain their fisheries, from which they mainly derive their subsistence.

The territory of plaintiff bands of Tillamooks is set out in the Palmer report as "The country along the coast from Umpqua River to the Ne-a-ches-na [river], a distance of about 120 miles, is occupied by five bands of the Tillamook[s] tribe."

6. Plaintiffs, the Tillamook, Coquille, Too-too-to-neys, and Chetco tribes and bands, parties to the unratified treaty of August 11, 1855, had exclusively occupied, held, and used from time immemorial (as shown by the proof from as early as 1750) that part of the lands embraced and described in the unratified treaty of 1855, as hereinafter particularly described, lying south of the north line of the Coast Reservation, mentioned as a reserve for the Indians in the unratified treaty of August 11, 1855, and described in a subsequent Executive order of November 9, 1855. The plaintiff tribes and bands above-mentioned in this finding had immemorially, and long prior to the date of the unratified treaty of August 11, 1855, held original Indian title, claim and rights to, in, and upon the lands and appurtenances thereon within the boundaries as are hereinafter in findings 8, 9, and 10 specifically described and set forth.

7. The four bands of plaintiff Tillamooks tribe which lived south of Cape Lookout and the north line of the reservation described in the treaty were designated in the treaty as bands of Tillamooks, and signed such treaty without further designation. However, the four bands constituted a tribe all speaking the same language. They were sometimes called the Yacons or Southern Tillamooks, and they held and occupied the contiguous lands, as hereinafter described in finding 8.

The Coquille tribe of Indians was composed of bands as set out in the caption of the petition herein and in the treaty of 1855. These bands of Coquille Indians were designated as a tribe by the language of the treaty of August 11, 1855, preceding the signatures of their chiefs and headmen.

The Too-too-to-ney tribe of Indians was composed of the bands as set out in the caption hereof, and were so designated

in the language of the treaty of August 11, 1855, preceding the signatures of their chiefs and headmen.

The Chetco tribe was at all times considered as a part of the Too-too-to-ney tribe, but there was a slight difference in the language of the two tribes. They were designated in the report of Gen. Palmer as the Too-too-to-neys, referred to in the treaty as the "Chetco tribe," and, although signing the treaty in the column with the Too-too-to-ney bands, signed the treaty as "Chetco Tribe." This tribe occupied the tract of land which was contiguous to the lands of the Too-too-to-ney tribe, as hereinafter described and set forth.

8. The bands of plaintiff Tillamooks tribe, the bands of the Coquille tribe, and the bands of the Too-too-to-ney tribe, including the Chetco tribe, are sometimes, for convenience, referred to hereinafter as the Tillamooks, Coquilles, Too-too-to-neys, and the Chetcos, respectively. The land so exclusively occupied, held, and used by plaintiff bands of Tillamooks, and to which they held and owned the original title, claim and right, is described as follows:

Commencing at the mouth of the north ten mile creek about midway between the Alcea and Sieuslaw River, running thence east to the summit of the Coast Range of Mountains, thence north along said summit to a point due east from Cape Lookout, thence west to the Pacific Ocean at said Cape Lookout, thence in a southerly direction along said Pacific Coast line to the point of beginning.

The four different bands of Tillamooks occupied the land above described in this finding commencing from the south in the following order: the Alceas, the Yahquonahs, the Seletcas, and the Neachesnas (Nestuccas and Salmon River Indians). The northern boundary of the land so occupied by the Alcea Band of Tillamooks commences on the coast just north of Bay View and runs thence northeasterly along the watershed between the Alcea and Yaquina River to the summit of the Coast Range of mountains. The northern line of the territory occupied by the Yahquonahs commences at the coast just south of Cape Foulweather thence in an easterly direction along the line of the watershed between the Siletz and the Yaquina River to the Coast Range of mountains. The northern boundary of the territory oc-

cupied by the Seletca Band of Tillamooks commences on the coast at a point five miles north of where the town of Taft now stands running thence in an easterly direction along the northerly watershed of the Siletz River to the summit of the Coast Range of mountains. The northern boundary of the territory occupied by the Neachesna Band of Tillamooks was the northerly line of the Coast Reservation as hereinafter set out.

9. The lands so exclusively occupied, held and used by the Too-too-to-neys, including the Chetco tribe, are described as follows: Starting at Four Mile Creek situated four miles south of the mouth of the Coquille River on the Pacific coast running east four miles, thence following along the watershed between the south fork of the Coquille River and the headwaters of Flores River and Sixes River in a southeasterly direction to Illahe (town), situated in the Rogue River drainage, thence in a northeasterly direction along the divide between the headwaters of the south fork and middle fork of the Coquille River and the headwaters of tributaries of the Rogue River and of Cow Creek tributary of the Umpqua River to Camas Valley located at a point near the easterly boundary of the land described in the unratified treaty; thence in a southerly direction following the easterly line of said land described in the unratified treaty to the California state line; thence west to the Pacific Coast line; thence in a northerly direction along said coast line to the point of beginning.

The land in this finding above described as the territory occupied by the Chetco Tribe starts at the coast of Cape Sebastian and runs thence in an easterly direction in a meandering line following the watershed which separates Hunters Creek and Pistol River, thence around the headwaters of Chetco River in a southeasterly direction where it intersects the boundary line with California at a point about 123°50′ west longitude. These boundary lines other than the northerly line of the plaintiff Tillamooks' territory are and were as shown on the map showing tribal distribution accompanying the report of John P. Harrington, being plaintiffs' exhibit 2, which map so far as it furnishes

the lines described in these findings is made a part hereof by reference.

10. The land so exclusively occupied, held and used by the Coquilles is described as follows: All that land lying between the easterly and westerly boundary of the land described in the unratified treaty lying between the northerly line of the land hereinbefore described as belonging to said Too-too-to-neys and a line commencing at Cut Creek or Whiskey Run about three miles north of the mouth of the Coquille River, thence in a northeasterly direction following the divide between South Slough, Island Slough, and Sumner Slough, on the north, and the drainage of the lower Coquille River on the south, thence along the divide between the south fork of Coos River on the north and the Drainage of upper Coquille River on the south in a southeasterly direction to the east line of the land described in the unratified treaty, at Camas Valley.

11. The Indian tribes and bands above-mentioned occupied more or less accurately described areas of land with clearly defined boundaries, and lived principally along rivers and creek banks bearing the same name as the tribe living along its banks. Generally, they appear to have taken their tribal designations from, or to have been given the names of certain streams along which they lived, or the streams were named for the Indian tribes.

The above-described lands which were ceded, including a portion of the total area which was designated by the unratified treaty of August 11, 1855, as a residence for Indians, were in the exclusive possession and use of plaintiffs Tillamooks, Too-too-to-ney, Coquille, and the Chetco bands and tribes, parties to this unratified treaty.

12. Plaintiffs Tillamooks, Too-too-to-ney, Chetco, and Coquille bands and tribes gave up their original Indian title to their lands in accordance with the conditional promises made by them in the unratified treaty of 1855 and went upon or were removed by the Government to the area mentioned in the treaty as a residence, described as a conditional reservation by the Executive Order of November 9, 1855, and later known as the Coast Reservation. This reservation, as described in the unratified treaty, and which was approxi-

mately that described in the Executive Order of November 9, was composed in part of a portion of the lands exclusively used, held, and occupied under original Indian title by the plaintiff bands of Indians composing the Tillamooks tribe. A part of the reservation at its south end appears to have included some of the lands claimed by the Coos Bay, Umpqua, or Siuslaw tribes.

This reservation was later reduced or diminished, as hereinafter mentioned, by an Executive Order of December 21, 1865, and, further, by acts of Congress of March 3, 1875, 18 Stat. 420, 446, and May 13, 1910, 36 Stat. 367.

The Tillamook, Too-too-to-ney, Chetco, and Coquille bands and tribes, plaintiffs herein, have never received any compensation for the lands to which they had original Indian title, hereinbefore mentioned in findings 8, 9, and 10, or the lands taken from the reservation and restored to the public domain by reduction of the Coast or Siletz Reservation by Executive Order of 1865 and the act of Congress of 1875, except to the extent that the Indians of the Tillamook, Too-too-to-ney, Coquille, and Chetco tribes benefited with respect to land to which the Tillamooks had original Indian title under the allotment act of February 8, 1887 (24 Stat. 388), the agreement of October 31, 1892 (28 Stat. 286, 323), the act of May 31, 1900 (31 Stat. 221, 223), and the act of May 18, 1916 (39 Stat. 123, 149).

Protests of the failure of the United States to ratify the treaty of August 11, 1855, were continuously made by the Indian tribes and bands, parties thereto, by the Government's Indian superintendents and agents and the Commissioner of Indian Affairs in his annual reports, in practically all reports up to and including 1869, and such protests continued thereafter at various times until the jurisdictional act herein was enacted.

13. The reservation herein known as the Coast or Siletz Reservation as originally described in the 1855 treaty and, for the most part, within the boundaries of the land to which plaintiff Tillamooks tribe and bands had original Indian title, was conditionally recommended and created during the period April 17 to November 9, 1855, under the circumstances and for the purposes shown below.

On April 17, before the unratified treaty dated August 11, 1855, was negotiated, Indian Superintendent Joel Palmer wrote the Commissioner of Indian Affairs as follows:

> Believing that the welfare of the Indians on the coast and in the Umpqua and Willamette valleys would be promoted and the policy of the Government more effectively carried out by designating without delay an Indian reserve on the coast, I have caused the inclosed notice to be published in the several newspapers of this Territory.
>
> I have been impelled to this step by learning that many persons contemplate soon to commence settlements in several small valleys of the designated district, and from the reluctance of the coast Indians to remove to the interior, a measure which I believe would be disastrous to them as a people, and attended with enormous expense to the Government.
>
> Being satisfied that no other section, offering so few attractions to the whites, combine more facilities for the comfort and subsistence of the Indians, I have selected this tract and recommend that it be made a permanent Indian reserve.
>
> Should the Indians of the Willamette and Umpqua valleys be removed east of the Cascade Mountains this reserve may be curtailed, but should they be located thereon the entire tract will be required.
>
> This portion of the Territory has not yet been purchased, but this will probably be effected during this summer, and the entire Indian population of the coast confederated.
>
> I had contemplated visiting the coast bands this spring but owing to the nonreception of funds, and the state of affairs in middle Oregon, I have deemed it best to postpone my trip to the coast until my return from the interior.
>
> I will, if possible, effect a treaty of purchase with those Indians during the summer.

April 18, Superintendent Palmer again wrote the Commissioner of Indian Affairs as follows:

> I send by to-day's mail a tin case containing a map of Oregon Territory, which I have had executed. This map, of course, is not presumed to be accurate in all respects, but it approximates as near to correctness as the means in our possession would permit.
>
> The portions within the limits of the actual surveys may be regarded as accurate. Mr. Belden, the projector,

having access to all the plats of survey in the office of the Surveyor-General. Other portions are in accordance with the most reliable information, but actual surveys may prove many inaccuracies.

I have delineated on the map the boundary of the proposed reserve on the coast, north of the Umpqua River, designed for the Indians of the entire seaboard of Oregon, those of this valley, and perhaps of Umpqua Valley.

June 29, the Commissioner of Indian Affairs wrote Palmer as follows:

I received on the 25th ultimo your letters of the 17th and 18th of April last, the first enclosing a copy of a notice designed to prevent settlement by whites on lands which you have thought proper to select as an Indian reservation on the coast of Oregon, and the latter stating that you had forwarded by the same mail a tin case containing a map of Oregon, with the reservation alluded to designated thereon.

The office would have given earlier attention to this subject but for the fact that it has waited the arrival of each successive mail since the letters came to hand in the hope of receiving the map referred to, but as it has not yet arrived the presumption is that it has been mislaid or lost.

As your report is not of a character to give full information as to the locality of the reserve in the absence of the map, I have deemed it best, in view of the importance of the subject and to secure an early arrangement of the matter if found practicable, thus early to advise you of the nonarrival of said map that you may send me a duplicate of the same.

The precaution taken by you in giving public notice of the selection of the reserve to prohibit settlement by whites thereon is approved.

It is desirable that you furnish some further data concerning the land selected, as well as to the character of the country and soil and its extent, if it is in your power to do so.

As soon as you shall do so, and the map arrives here, some conclusion upon the proposition will be arrived at and communicated to you. But on the receipt of this you will inform the land officers of the district, within which the proposed reservation lies, of its boundaries, that they may be able to recognize the plat, and in their official capacity respect the same, as the Commissioner

of the General Land Office has been requested to instruct them to do.

On the same date the Commissioner of Indian Affairs wrote the Commissioner of the General Land Office as follows:

> The superintendent of Indian affairs of Oregon, under dates of 17th and 18th of April last, advised this office of the selection on the coast of Oregon of a district of country for an Indian reservation. In that of the 17th of April was inclosed a copy of a public notice stated to have been published in the several newspapers in the Territory, giving information that said "reservation will not be subject to settlement by whites." That of the 18th informed this office that a map inclosed in a tin case was forwarded by the same mail, the outlines of the country designated as the reserve being marked on this map.
>
> I have waited until this time without calling attention to the subject in the hope that the map would arrive by some of the recent mails, but it has not yet come to hand; so with a view, as far as practicable, to secure respect to the notice given by the superintendent, I inclose to you herewith a transcript of the copy received here, and request that so far as the same is within the power of the officers of your department, that they be instructed officially to respect the same in view of this request.
>
> Supt. Palmer has this day been directed to inform the proper land officers of the district where the land lies, what are its boundaries. As soon as a duplicate of the map, which has been sent for, shall arrive, with such data as will enable this Department to fix by definite metes and bounds the country designated, should it be deemed proper to withhold the same for the exclusive occupancy of the Indians of that section of the country, your office will be advised. In the meantime it is desirable that no settlements by whites be authorized to be made thereon by or under the authority of the Government.

July 31, the Commissioner of Indian Affairs wrote Superintendent Palmer as follows:

> Referring to my letter to you of the 29th ultimo, stating that a map of an Indian reserve on the coast of Oregon, previously represented by you to have been sent to this office, had not been received, and requesting

duplicate to be sent here, I have now to inform you that said map was received by the last mail from the Pacific and it will therefore not be necessary to send the duplicate referred to.

The subject referred to in your communication transmitting this map will be considered and the conclusions of the Department thereon will be duly communicated to you at an early day.

September 3, the Commissioner of the General Land Office wrote the Commissioner of Indian Affairs as follows:

> Your communication of the 29th of June last, and its inclosure relative to a proposed reservation for Indians on the Pacific coast, Oregon Territory, and promising a map of the same, which had not yet reached your office, has been necessarily held up for want of said map and in consequence of not being able from the description to identify the southern boundary of the reserve on any of the maps in this office. I will thank you to transmit the map, if it has since been received, in order that the action of this office may be consummated by procuring the order of the President for the reservation and issuing the necessary instructions.

September 6 the Commissioner of Indian Affairs replied to the above letter as follows:

> Agreeably to the request contained in your letter of the 3d instant, I transmit herewith the map showing the locality of certain Indians in Oregon and the proposed reservation upon the Pacific coast, referred to in my letter to your office of 28th June last.
>
> This map was received here several days since and it was in contemplation to furnish your office with a copy, but owing to the illness of the gentleman who executes the drafting for this office it has been delayed. I have, therefore, to suggest that a copy be made as early as convenient for the use of your office and that the original be returned here.

September 10, the Commissioner of the General Land Office sent the following letter to the Secretary of the Interior recommending the conditional creation of a proposed reservation for Indian purposes, as had been recommended by Gen. Palmer and as subsequently substantially set forth by him in the proposed treaty dated August 11, 1855:

> **I have the honor to submit herewith two letters from the Acting Commissioner of Indian Affairs of the 29th**

> June last and the 6th instant, recommending a large reservation of land, for the Coast, Umpqua, and Willamette Tribes of Indians in Oregon Territory, as shown by the *blue* shaded lines and the enclosed diagram, marked A, taken from the general map received with the Acting Commissioner's letter of the 6th instant and embracing, as will be seen, about 100 miles of the Pacific coast from "Cape Look Out" to a point midway between the Umpqua and Siuslaw (Sciiticom) rivers, by an average depth of 20 miles.
>
> Previous to issuing the instructions requested by the Acting Commissioner, I respectfully recommend that the order of the President be first obtained for the proposed reservation.

Prior to the writing of this letter of September 10, 1855, treaties had been negotiated and signed in 1853, 1854, and 1855, and duly ratified by the Senate with the bands of Indians of the Rogue River tribe, the Chastas, the Scotons (which were Coast Indians), the Confederated Bands of the Umpqua tribe and the Confederated Bands of Indians in the Willamette Valley known as the Willamette tribes (see finding 3). The ratified treaties with these tribes provided that they would be given permanent homes, care, and protection, and various other things were promised to the tribes on a permanent reservation for their permanent homes; one of these treaties mentioned such permanent home as the Coast Reservation described in the unratified treaty of August 11, 1855, with certain of plaintiff tribes.

Upon receipt of the above-quoted letter of September 10, the Secretary of the Interior wrote the Commissioner of Indian Affairs for a full report on the matter, and as to the authority for the proposed reservation. October 29, the Commissioner of Indian Affairs replied and, so far as here material, stated as follows:

> I have the honor to acknowledge the receipt here, by reference from your Department, of the letter of the Commissioner of the General Land Office of the 10th ultimo, inclosing letters from this to that office of the 29th June last and 6th ultimo, respectively, with a map showing the tract of country that has been reported here as suitable for the location of the Indians on the Pacific coast for "a report as to the authority for the reservation in question."

Under the act of 5th June, 1850, specific authority was given by law for the holding of treaties in Oregon, looking then to the purchase of the Indian title to the lands west and the removal of the Indians toward the interior, east of the Cascade Mountains. An appropriation of $68,000 was also made in the Indian appropriation act of July 31, 1854, "for the expenses of negotiating treaties with and making presents of goods and provisions to, the Indian tribes in the Territory of Oregon."

By the same act, an item of $5,000 was appropriated to pay for the treaties made in 1853 with the Rogue River and Cow Creek band of Umpqua Indians. * * *.

As Congress is not now in session nor as yet are the reports of the Superintendent of Indian Affairs in Oregon so full as is desired to enable the office to make a final report upon the proposition, it was deemed proper that for the time being, and, until the subject could be more fully considered, the tract of country selected by the superintendent should be withheld from settlement. It is believed that this course does not conflict with the uniform policy of the Government, and is in keeping with that pursued in the case of the treaties in Oregon already ratified.

* * * * *

On the 29th of June, upwards of a month after the reception of the letter from the superintendent recommending the reservation, and near a month anterior to the receipt of the map, in view of frequent casualties causing delay in the transmission of mail matter, and presuming Supt. Palmer would feel some concern as to the result of his recommendation, the Acting Commissioner of this Office advised him of the receipt of his letter and the nonarrival of the map and asked a duplicate of the latter. As will be seen by the copy of that letter, herewith, the preliminary steps taken by the superintendent were approved, but the definitive action to be taken under the direction of the Department of the Interior and the President of the United States, was necessarily postponed, because his report, in the absence of the map, was not of a character to give such full information as to enable this office properly to present the case for your consideration and that of the President. It was, therefore, deemed best to ask "Further data concerning the land selected, as well as to the character of the country and soil, as to its extent," etc. On the receipt of which he was informed that "Some

conclusion upon the proposition would be arrived at and communicated to him."

From a letter from Supt. Palmer of the 24th of July last, received here on the 11th ultimo, an extract from which is also herewith, it appears that very great embarrassment must result to the service because this subject has not been determined. As, therefore, the policy of concentrating the Indians upon one or more reservations is that already adopted in the State of California by act of Congress, and I know no reason why the recommendation made by the superintendent is not the best. In view of all the surrounding circumstances, that can be devised, I respectfully recommend that the tract of land designated on the accompanying map from the General Land Office as that "proposed for Coast and Umpqua and Willamette Indians," be reserved from sale or settlement and set apart for Indian purposes, subject, however, to such curtailment in dimensions as treaties hereafter to be made and ratified and a better knowledge of the requirements of the Indians may admit, under the direction of Congress. It is only by some such action that the salutary provisions for treating with the Indians of Oregon for a cession of their lands to the United States, and their consequent concentration at any point can be carried into effect without the delay of further legislation, if not war and bloodshed.

* * * * *

After receipt and consideration of the above-quoted letter of October 29, the Secretary of the Interior on November 8, 1855, wrote a letter to the President submitting this proposed conditional reservation to him for approval. This letter of the Secretary was as follows:

I herewith submit for your approval a proposed reservation for Indians on the coast of Oregon Territory recommended by the Commissioner of Indian Affairs and submitted to the Department by the Commissioner of the General Land Office for the procurement of your order on subject, in letter of the 10th September last.

Before submitting the matter to you I desired to have a full report of the subject from the Indian Office; and the letter of the head of that Bureau, of the 29th ultimo, having been received and considered, I see no objection to the conditional reservation asked for "subject to future curtailment, if found proper," or entire relief thereof,

should Congress not sanction the object rendering this withdrawal of the land from white settlement at this time advisable. A plat marked A, and indicating the boundaries of the reservation, accompanies the papers, and has prepared thereon the necessary order for your signature should you think fit to sanction the reservation.

Thereupon the President issued an Executive Order of November 9, 1855, as follows:

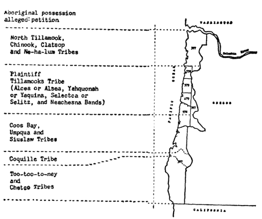
> The reservation of the land within the blue shaded lines is hereby made for the purposes indicated in the letter of the Commissioner of the General Land Office of the 10th September last and letter of the Secretary of the Interior of the 8th November 1855.
>
> (Sgd.) FRANKLIN PIERCE.

14. The particular description of the said reservation within the "blue shaded lines" referred to in the Executive Order of November 9 is as follows:

> Beginning on the shore of the Pacific ocean at the mouth of a small stream (Tsiltcoos river), about midway between Umpqua and Siuslaw rivers; thence easterly to the ridge dividing the waters of these streams, and along said ridge or highland to the western boundary of the eighth range of township W. of the Willamette meridian; thence N. on said boundary to a point due E. of Cape Lookout; thence W. to the ocean; and thence along the coast to the place of beginning.

15. The map which accompanied the letter of the Secretary of Interior and the Executive Order of November 9, 1855, showed the reservation to be, as indicated by the General Land Office, for the "Coast, Umpqua and Willamette tribes." This Coast Reservation, later known also as the Siletz Reservation, consisted of a long strip of land about 120 miles north and south by 20 miles east and west, containing about 1,100,000 acres between the summit of the Coast Range of mountains and the Oregon coast, lying immediately south of Cape Lookout and marked on plate 51 of a map in Royce's Indian Land Cessions of the United States (18th Annual Report of the Bureau of American Ethnology) as parcels 578, 579, 479, and 578 (repeated for a lower tract), which descriptions are shown on the sketch reproduced here, which sketch also shows

within the dotted lines the approximate areas within which the tribes mentioned therein lived.



16. The boundaries particularly set forth in finding 14, which were those designated in the Executive Order of November 9, were approximately those of the reservation set out in the unratified treaty of August 11, 1855. Congress acquiesced in and ratified the Executive Order of November 9, 1855, as only conditionally withdrawing the land from public settlement by the passage of the act of March 3, 1875 (18 Stat. 420, 446), hereinafter referred to.

17. The land to which plaintiff Tillamooks tribe owned and held original Indian title as hereinbefore described, and as approximately indicated on the above sketch, lay for the most part within the confines of the original Coast Reservation, and such land of this tribe as was within such reservation was taken on November 9, 1855, in part by defendant from the Tillamook tribe for the benefit of other tribes and bands and in part for the benefit of the United States as and when it might desire to use it for public purposes, by virtue of the Executive Order of November 9, 1855,

ratified by Congress. The land of the Tillamook tribe, as hereinbefore described in finding 8, as lay outside the boundaries of said Coast Reservation was taken by defendant from said Tillamooks on November 9, 1855, or soon thereafter, as were the lands of the Coquille, Too-too-to-ney, and the Chetco tribes when these four tribes were moved off their lands in 1855, at or about the date of the Executive Order of November 9, creating the Coast Reservation described therein.

18. The land of plaintiff Tillamooks tribe outside the Coast Reservation and all the lands of the Coquille, Too-too-to-ney, and Chetco tribes were taken by inducing and coercing the Indians of these tribes to move from their lands, to which they held original Indian use and occupancy title, to the Coast Reservation upon the promise that the treaty of August 11, 1855, would be ratified and the terms thereof carried out by the United States—which was not done.

The lands formerly held and occupied by plaintiffs Tillamooks, Coquille, Too-too-to-ney, and the Chetco tribes, exclusive of the portion of land of the Tillamooks included in the Coast Reservation, were immediately opened to homestead entry and settlement as public lands of the United States, which action was known to, acquiesced in, and subsequently ratified by Congress; the lands originally within the reservation under the unratified treaty and the Executive Order of November 9, 1855, which were later excluded by the Executive Order of December 21, 1865, and the act of Congress of March 3, 1875, were disposed of as public lands immediately upon the taking effect of such Executive Order and statute.

19. After the treaty of August 11, 1855, had been signed by Gen. Palmer on behalf of the United States and by the chiefs and headmen of the Indian tribes and bands, parties thereto, and without awaiting ratification thereof, the United States dispossessed the Indians of the Coquille, Too-too-to-ney, and Chetco tribes, and in part the Tillamooks, all parties to the treaty, of their lands, and without the consent of the Indian tribes mentioned and against their will, independently of the conditional consent expressed by them in the unratified treaty of August 11, 1855, and with-

out compensation then or later, and appropriated such lands for the use and benefit of the United States.

20. Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation.

21. On December 20, 1865, the Secretary of the Interior recommended to the President that an Executive Order be made releasing or withdrawing from the Coast Reservation theretofore "set apart conditionally" and restoring to public use that portion of such Coast Reservation, as follows:

> * * * Commencing at a point 2 miles south of the Siletz Agency; thence west to the Pacific Ocean; thence south along said ocean to the mouth of the Alsea River; thence up said river to the eastern boundary of the reservation; thence north along said eastern boundary to a point due east of the place of beginning; thence west to the place of beginning.

Thereupon an Executive Order was issued as follows:

> EXECUTIVE MANSION,
> *December 21, 1865.*
>
> The recommendation of the Secretary of the Interior is approved, and the tract of land within described will be released from reservation and thrown open to occupancy and use by the citizens as other public land.
>
> (Sgd.) ANDREW JOHNSON,
> *President.*

The land described in this Executive Order was withdrawn from the reservation without consent of the Indians and without compensation as a result of insistent demands made by white settlers. The land so withdrawn consisted of a strip from the coast to the eastern boundary of the reservation which is designated as parcel #479 on the sketch hereinbefore reproduced in finding 15. This tract was about twenty-five miles north and south by twenty miles

east and west. Plaintiff Tillamook tribe originally owned and exclusively held original Indian use and occupancy title to the area so taken from the reservation, which was, by the Executive Order in 1865, immediately opened for public settlement.

This Executive Order separated the Coast Reservation into two parts and, thereafter, the north portion was known as the Siletz Reservation and the south portion as the Alcea Reservation. From time to time prior to the Executive Order in 1865 the Superintendent of Indian Affairs, of Oregon, had made various reports with reference to the proposed reduction of the Coast Reservation by withdrawing therefrom the strip of land in question for the benefit of white settlers, and in these reports he urged that, if this should be done, sufficient time should be given him to move the Indians off the area to be withdrawn from the reservation, and insisted that if it was done proper arrangements be first made with the Indians to compensate them therefor. Neither request of Superintendent Palmer was granted. The tract of land covered by the Executive Order was opened for public use and settlement before the Indian tribes and bands thereon were moved. The Indians were subsequently moved to other portions of the diminished reservation.

22. By an act of March 3, 1875 (18 Stat. 420, 446), Congress ratified the objects and purposes set forth in the above-quoted Executive Orders of November 9, 1855, and December 21, 1865, and the actions which had been taken thereunder, and, by that act, the remainder of the Coast Reservation was further modified or diminished as follows:

> And the Secretary of the Interior be, and hereby is, authorized to remove all bands of Indians now located upon the Alsea and Siletz Indian reservation, set apart for them by Executive order dated November ninth, eighteen hundred and fifty-five, and restored to the public domain by Executive order of December twenty-first, eighteen hundred and sixty-five, and to locate said Indians upon the following described tract of country, namely: Beginning at a point two miles south of the Siletz agency; thence west to the Pacific Ocean; thence north, along said ocean, to the mouth of Salmon River;

> thence due east to the western boundary of the eighth range of township west of the Willamette meridian; thence south with said boundary to a point due east of the place of beginning; thence west to the place of beginning; which is hereby set apart as a permanent reservation for the Indians now occupying the same and to be hereafter located thereon; and all the balance of said Alsea and Siletz reservations is hereby thrown open to settlement under the land laws of the United States: *Provided*, That these Indians shall not be removed from their present reservation without their consent previously had.

The land described in the above-quoted statute as the diminished reservation was parcel 579 shown on the sketch reproduced in finding 15; the effect of the act was to withdraw from the reservation without the consent of the Indians and without compensation the two parcels shown on said sketch numbered 578 at the north and at the south ends of the reservation. Plaintiff Tillamooks bands originally jointly held the original Indian title to north parcel 578 and all or a portion of south parcel 578. These tracts of land were, upon enactment of the act of March 3, 1875, immediately opened for public settlement and occupancy before the Indians thereon were removed to the diminished reservation. The withdrawal of the above-described lands in parcels numbered 578 from the Executive Order reservation was not conditioned upon the consent of the Indian tribes or bands thereon. The consent of the Indians to their removal from the two tracts numbered 578, upon which they were residing, to the diminished reservation was finally obtained about September 16, 1875, or thereafter, and they were removed by the Government to the diminished reservation about October 28, 1875. The names of the Indian tribes or bands so removed are not shown but they appear to have been the Alcea, the Coos Bay, the Umpqua, and the Siuslaw.

23. The general allotment act of February 8, 1887, 24 Stat. 388, provided for allotment of lands in severalty to Indians of various existing reservations if the President deemed such allotments advantageous for agricultural and grazing purposes. In pursuance of this act certain allot-

ments were made to Indians permanently located, at that time, on the diminished Siletz Reservation, as described in the act of March 3, 1875, *supra*.

On October 31, 1892, a certain agreement was negotiated and made pursuant to an act of July 13, 1892, 27 Stat. 120, 137, between commissioners on the part of the United States, and the chiefs, headmen, and other male adults of the Alcea and other Indians, not identified by the record, residing on the Siletz Reservation, which agreement is set out in full in sec. 15 of the act of August 15, 1894, 28 Stat. 286, 323. This act accepted, ratified, and confirmed the agreement which, in substance, ceded 178,840 acres of land within the diminished reservation as it then existed to the United States for $142,600, which was all the unallotted lands on the then existing reservation with the exception of five sections. This amount was, under the terms of the agreement, to be paid by the United States in the manner therein provided, namely: $100,000 to be deposited in the Treasury to the credit of various tribes and bands of Indians on the reservation at 5 percent interest, and the balance of $42,600 to be paid in cash to the various Indians concerned. May 16, 1895, by Presidential proclamation, the 178,840 acres of land so ceded were opened for public settlement pursuant to and in accordance with the act of Congress which ratified the agreement of October 31, 1892. The lands so ceded were embraced within and constituted a part of parcel 579 shown in the sketch reproduced in finding 15, with the exception of the five sections mentioned in the agreement.

24. By the act of May 31, 1900, 31 Stat. 221, 233, provision was made for payment of the balance of $100,000 mentioned in the preceding finding, which had been deposited at 5 percent interest to the credit of the Indians, directly to certain Indians on the diminished reservation mentioned who came within the requirements of that statute.

25. By the act of May 13, 1910, 36 Stat. 367, Congress gave the Government permission to dispose of the five sections of land reserved in the above-mentioned agreement of October 31, 1892. This act directed that the proceeds be used to reimburse the United States for expenses incurred in carrying out provisions of the act and for certain school

buildings, with their equipment and maintenance, and no part of the money was by that act to be paid directly to the Indians.

26. By the act of May 18, 1916, 39 Stat. 123, 149, Congress amended the act of May 13, 1910, so as to provide that the amount of money remaining after reimbursement of the United States for its expenses be paid share and share alike to the enrolled members of the Indian tribes on the Siletz Reservation.

27. The Siletz Confederated Tribes of Indians and the Willamette Valley Confederated Tribes of Indians, included as parties plaintiff in the petition, are composed of certain members of various bands or tribes not named in the record, and are sometimes so designated. The Confederated tribes of the Grand Ronde Community, Oregon (not otherwise identified), made plaintiffs in the petition herein, had organized by the Constitution under sec. 16 of the act of June 18, 1934, 48 Stat. 984, 987, and, as so organized, were authorized by such act to bring and prosecute authorized actions at law. The rights of these confederated tribes, such as they may be, are limited as representative of, for, and on behalf of the tribes, bands, and their descendants from which they were organized.

The Indians composing the above-mentioned three confederated tribes appear to be descendants of Indians who were members of certain tribes or bands not parties to the unratified treaty of August 11, 1855, or not otherwise entitled to sue under the jurisdictional act.

28. The predecessor tribes and bands of the Siletz Confederated Tribes of Indians were placed on the Coast Reservation.

The Willamette Confederated Tribes of Indians were not placed on the Coast Reservation.

The proof does not show that the Indians composing "The Confederated Tribes of the Grand Ronde Community, Oregon," were placed on the Coast Reservation, nor from what predecessor tribes or bands they were organized.

The last two above-mentioned Confederated tribes appear to have been Indians placed on the "Grand Ronde Reservation," which was not a part of the "Coast Reservation" but

was a temporary reservation embraced in townships 5 and 6 south, of range 8 west, and parts of townships 5 and 6 south, of range 7 west, Willamette District, Oregon, created "for Indian purposes until otherwise ordered" by Executive Order of the President of June 30, 1857, for the colonization of Indian tribes in Oregon,—particularly for the Confederated Willamette Valley tribes, including the Calapoosia and Molel tribes, all parties to ratified treaties dated November 29, 1854, January 22, 1855, and December 21, 1855.

29. Plaintiffs Chinook, Clatsop, and the Ne-ha-lum tribes were placed on the Coast Reservation, but they were not parties to the unratified treaty of August 11, 1855 mentioned in clause (b) of the jurisdictional act (see finding 2). However they were parties to certain unratified treaties made in 1851 which attempted to cede certain lands lying north of the north boundary of the lands held and occupied by plaintiff Tillamooks tribe and north of the north boundary line of the Coast Reservation described in the treaty of August 11, 1855, and the Executive Order of November 9, 1855, which land, so mentioned in the treaty with them in 1851, was included in the description of the total area of land set out in the unratified treaty of August 11, 1855, as being ceded to the United States. These lands lay between the north line of said Coast Reservation, as originally defined, and the Columbia River. The dates of such 1851 unratified treaties made with these tribes by Anson Dart, and the description of the territory conditionally ceded therein were as follows:

The unratified treaty of August 5, 1851, with the Clatsop Tribe ceded by Article 1 all their land described therein as: Beginning at the western extremity of Point Adams, at the mouth of the Columbia River and running thence southerly, along the coast of the Pacific Ocean, to the mouth of a certain stream, south of what is called Tillamook Head, which stream is called by the Indians "Yock-les-reh-ta," thence easterly up and along said stream to its source; thence east to the summit of the Coast Range of Mountains; thence northerly to the Swalla-lockas, or Saddle Mountain; thence Northwesterly to the head waters of the Neetle or Lewis and Clark's River; thence down and along said river to Young's

Bay; thence westerly along the shore of said bay, and the southern shore of the Columbia River to the place of beginning.

The unratified treaty of August 9, 1851, with the Kathlamet Band of Chinooks ceded by Article 1 all their lands described as: Beginning at point of land on Young's Bay called Ah-pin-pin running thence northerly and easterly following the southern shore of the Columbia River up to Hunt Mill; thence south on the west line of lands of the Konnaack band of Chinooks to the northern boundary of lands of the Klatakania Band of Chinooks; thence westerly following said northern boundary, and the northern boundary of lands formerly claimed by the Nuc-que-clah-we-muck Band of Indians. Also all the islands in the Columbia River opposite the above-described lands.

The unratified treaty of August 6, 1851, with the Nehalum Tribe (Naalem) ceded the territory lying between the southerly boundary line of the Clatsop tract above described and the northerly boundary line of the tract of land ceded in the unratified treaty of 1851 by the "Tillamook," or North Tillamook, Tribe, which is the northerly line of said Coast Reservation.

30. By the act of June 7, 1897 (30 Stat. 62), Congress made an appropriation for full settlement of claims under the unratified treaty of August 6, 1851 with the Naalem (which was the Ne-ha-lum tribe, a party plaintiff herein) band of the North Tillamook tribe, as follows:

> That there be paid to the Naalem band of the Tillamook tribe of Indians, of Oregon, the sum of ten thousand five hundred dollars, to be apportioned among those now living and the heirs of those who may be dead, by the Secretary of the Interior, as their respective rights may appear and that for this purpose there be appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of ten thousand five hundred dollars: *Provided*, That said Indians shall accept said sum in full of all demands or claims against the United States for the lands described in an agreement made with them dated the sixth day of August, eighteen hundred and fifty-one.

31. The act of Congress of August 24, 1912, (37 Stat. 518, 535), made the following provision for full settlement and satisfaction of claims arising out of certain unratified treaties, mentioned in the act, negotiated and made in 1851 with the Tillamook, Clatsop, Chinook, and Nuc-quee-clah-we-muck tribes, as follows:

> That there be paid to the Tillamook Tribe of Indians of Oregon the sum of ten thousand five hundred dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Clatsop Tribe of Indians of Oregon the sum of fifteen thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Nuc-quee-clah-we-muck Tribe of Indians of Oregon the sum of one thousand five hundred dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Kathlamet Band of Chinook Indians of Oregon the sum of seven thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Waukikum Band of Chinook Indians of Washington the sum of seven thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Wheelappa Band of Chinook Indians of Washington the sum of five thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; and that there be paid to the Lower Band of Chinook Indians of Washington the sum of twenty thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear, and for this purpose there be, and is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of sixty-six thousand dollars: *Provided*, That said Indians shall accept

said sum, or their respective portions thereof, in full satisfaction of all demands or claims against the United States for the lands described in the agreements or unratified treaties between the United States and said Indians dated, respectively, August seventh, eighteen hundred and fifty-one; August fifth, eighteen hundred and fifty-one; August seventh, eighteen hundred and fifty-one; August ninth, eighteen hundred and fifty-one; August eighth, eighteen hundred and fifty-one; August ninth, eighteen hundred and fifty-one; and August ninth, eighteen hundred and fifty-one: * * *."

32. The various tribes and bands mentioned in the foregoing acts of 1897 and 1912 (including the Clatsop, Chinook, and Ne-ha-lum tribes or bands, plaintiffs herein) accepted the sums appropriated to pay their claims in satisfaction and in full of all demands or claims against the United States for lands claimed by them and described in the agreements or unratified treaties in the year 1851 between such tribes and bands and the United States.

33. Plaintiff bands of Tillamooks did not belong to the "Tillamook Tribe" mentioned in the act of August 24, 1912, *supra*, nor to the "Naalem band of Tillamooks" mentioned in the act of June 7, 1897, *supra*. The territory of plaintiff bands of Tillamooks, known as Southern Tillamooks, lay south, while that of the Tillamook Tribe and the Naalem Band of Tillamooks, known as North Tillamooks, lay north of the north line of the Coast Reservation. None of plaintiff tribes or bands which was a party to the unratified treaty of August 11, 1855, described in the jurisdictional act, was a party to any of the above-mentioned 1851 treaties, or party beneficiary of the acts of Congress.

34. The particular lands for which claim for compensation is made in the petition herein, and as hereinbefore described and to which plaintiffs Tillamooks, Coquille, Too-too-to-ney, and the Chetco tribes held and owned the original Indian title through exclusive use and occupancy from time immemorial, were taken by the United States for a public purpose on or shortly after November 9, 1855, without payment of just compensation.

35. The various tribes and bands of Indians, including plaintiffs Tillamooks, Coquille, Too-too-to-ney, and Chetco,

permanently placed by the Government on the Coast Reservation as described and defined by Executive Order of November 9, 1855, and as subsequently diminished, acquired occupancy rights, such as they were, in common according to population or according to the specific area assigned to each tribe or band. The Coast Reservation as defined in Executive Order of November 9, 1855, was not originally created nor subsequently recognized by Congress, other than by the Act of August 15, 1894, and subsequent acts, as a reservation for the exclusive use and occupancy of plaintiff tribes and bands parties to the unratified treaty of August 11, 1855, and other tribes and bands placed thereon.

36. Plaintiff bands of the Tillamooks tribe did not and have not at any time given binding consent to the placing by the United States of other tribes and bands of Indians on the land to which plaintiff bands of the Tillamooks tribe owned and held original Indian title in 1855 and for many years prior thereto.

Plaintiffs Tillamooks, Coquille, Too-too-to-ney, and Chetco tribes, parties to the unratified treaty of August 11, 1855, did not and have not given binding consent to the placing by the United States of other tribes or bands of Indians on the reservation included within the original or diminished boundaries of the Coast or Siletz Reservation.

37. Among the Indian tribes and bands, some of which appear to have been permanently placed upon and given permanent homes on the Coast Reservation, which did not have or claim original Indian use and occupancy title to any of the lands within such reservation, or to the lands for which claim is made in the petition herein under clause (b) of the jurisdictional act by the tribes and bands, parties to the unratified treaty of August 11, 1855, were the following:

(1) The Rogue River Tribe: Treaty of September 10, 1853, ratified April 12, 1854 (10 Stat. 1019)—art. 2 of which defined an area within the lands ceded as a reserve for their temporary use and occupancy "until a suitable selection shall be made by direction of the President for their permanent residence, and buildings erected thereon, and provision made for their removal."

(2) The Cow Creek Band of the Umpqua Tribe: Treaty of September 19, 1853, ratified April 12, 1854 (10 Stat. 1027—art. 2 of which was the same as that above mentioned with reference to the Rogue River Tribe.

(3) The Chasta tribe, the Scotons tribe, and the Grave Creek band of Umpqua Tribe: Treaty of November 18, 1854, ratified March 3, 1855 (10 Stat. 1122)—art. 2 of which provided that these tribes would remove to "whatever reserve the President may at any time hereafter direct."

(4) The Confederated Bands of the Umpqua Tribe, and the Calapoosia bands residing in the Umpqua Valley: Treaty of November 29, 1854, ratified March 3, 1855 (10 Stat. 1125)—art. 2 of which defined an area within the cession made by these Indians as a reservation, and stated that such "reserve shall be held by said confederated bands, and such other bands as may be designated to reside thereupon, as an Indian reservation." This article further provided that the bands, parties to the treaty, might be moved elsewhere with their consent, and, if so moved, the reservation mentioned was to be sold by the United States for their benefit.

(5) The Confederated Bands of Indians residing in the Willamette Valley (15 bands listed), most of whom belonged to the Calapoosia Tribe: Treaty of January 22, 1855, ratified March 3, 1855 (10 Stat. 1143)—art. 1 of which provided that these bands were to remain in the area ceded by them in their treaty and on such temporary reserves thereon as should be made by the Indian superintendent "until a suitable district of country shall be designated for their permament home and proper improvements made thereon: * * *. At which time, or when thereafter directed by the superintendent of Indian affairs, or agent, said confederated bands engage peaceably * * * to vacate the country hereby ceded, and remove to the district which shall be designated for their permanent occupancy."

(6) The Mo-lal-la-las, or Molel, Tribe: Treaty of December 21, 1855, ratified March 8, 1859 (12 Stat. 981). The Indians of this tribe by art. 1 of the treaty became confederated with the Indians of the Umpqua Tribe and the Calapoosia

Tribe, or bands. Art. 3 of this treaty provided, as to the Molel, the Umpqua, and the Calapoosia tribes, that "* * * it is hereby agreed, the Umpaquahs and Calapoosias agreeing, that the bands thus confederated shall immediately remove to a tract of land selected on the headwaters of the Yamhill River adjoining the coast reservation, thereon to remain until the proper improvements are made upon that [Coast] reservation, for the accommodation of said confederated bands, in accordance with the provisions of * * * the treaty of 29th November 1854, and when so made, to remove to said coast reservation, or such other point as may, by direction of the President * * *, be designated for the permanent residence of said Indians." Art. 6 stated that the temporary reserve or encampment adjoining the Coast Reservation was in the "Grand Round Valley." This temporary reservation was created by Executive Order of June 30, 1857 (finding 28) and was known as the Grand Ronde Reservation. The United States agreed in this treaty to pay all costs of removal for transportation, subsistence, and medical care, in addition to all other promises and the payments provided for; and $12,000 was provided for in art. 6 to be used in extinguishing claims of settlers in the area of the temporary encampment, or reservation, in the Grand Ronde Valley.

The Indians of the Rogue River and Chasta tribes were placed on the Coast Reservation in May 1857.

The court decided that the plaintiffs, the tribes and bands of the Tillamooks, the Coquille, the Too-too-to-ney, and the Chetco, were entitled to recover. Judgment as to the amount of recovery and the amount of offsets, if any, was reserved for further proceedings under rule 39 (a).

The court further concluded as a matter of law that plaintiffs Umpqua Tribe, Chinook Tribe, Clatsop Tribe, Ne-ha-lum Tribe, Confederated Tribes of the Grand Ronde Community, Oregon, Willamette Valley Confederated Tribe, and the Siletz Confederated Tribe were not entitled to recover, and the petition was dismissed as to these tribes.

LITTLETON, *Judge*, delivered the opinion of the court:

Section 1 of the jurisdictional act (49 Stat. 801) under which this suit was brought provides as follows:

> That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), September 19, 1853 (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 25, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143), and December 21, 1855 (12 Stat. 981), may have against the United States; and (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

Sec. 2 provides "That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * * and any nation, tribe, or band the court may deem necessary to a final determination of such suit or suits may be joined therein by order of the court." This section further provides that "The petition shall set forth all the facts upon which the claims are based and shall be signed and verified by the attorney or attorneys

employed to prosecute such claim or claims and who are under contract with said Indians approved in accordance with existing law." It further provides that any and all claims against the United States should be forever barred "unless suit be instituted or petition filed as herein provided" within five years from date of approval of the act.

Plaintiffs brought suit under clause (b) of the act upon claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon lands occupied by Indian tribes and bands described in the unratified treaty dated August 11, 1855, published in Senate Executive Document No. 25, Fifty-third Congress, first session, p. 815. This unratified treaty is set out in full in paragraph 8 of the petition (see finding 3).

The first question to be disposed of is whether certain tribes and bands made parties plaintiff in the petition herein are entitled under the jurisdictional act and the allegations of the petition to bring and maintain this suit for compensation.

The second amended petition sets forth, in paragraphs 5, 6, and 7, specific claims based on original Indian title for lands alleged to have been taken only by and on behalf of plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos. The petition does not set forth facts sufficient to show the nature or extent of any legal or equitable claim, or claims, if any, which any of the tribes made plaintiffs in the petition, other than the four tribes above mentioned, may have against the United States.

Paragraph 13 of the amended petition seems to be a blanket claim without any allegation of facts to show the nature, extent, or basis thereof, on behalf of all tribes and bands of Indians made plaintiffs herein, including the Tillamooks, Coquilles, Too-too-to-neys, and Chetcos, whether they did or did not have treaties ratified or unratified with the Government, or no treaties at all, some of which Indians appear to have been, at some time not alleged, placed by the Government on the Coast Reservation conditionally created by Executive Order of November 9, 1855, as set forth in finding 13.

Paragraph 11 of the petition states "That said plaintiffs were Coast tribes" and that when said reservation was set apart for "Coast, Umpqua and Willamette tribes they became entitled jointly with such other Indians therein named to its lands for a reservation to the exclusion of Indians not therein named. That defendant violated their said rights in said reservation to their great damage by placing Rogue River, Chasta, and other Indians [upon these lands] not included in the terms of [the Executive Order creating] said reservation and by taking the lands as hereinafter described." The "other Indians" are not identified by the petition, or by proof.

Paragraph 12 of the petition states "That by Executive Order of December 21, 1865, the defendant took away from said Indians without authority of law to their great damage said tract No. 479. That by act of Congress March 3, 1875 (18 Stat. 420, 446 [446]), the defendant took away said two tracts each No. 578, leaving only tract No. 579." (See sketch reproduced in finding 15.)

Paragraph 13 of the petition alleges as follows:

> That all of said tribes including bands and tribes having entered into no treaty ratified or unratified claim damages because of violations of agreements, Acts of Congress and executive orders and because of Acts of Congress and executive orders and acts of dispossession relating to realty, personal property, rights of possession, rights to minerals, timber rights, fishing and hunting rights.

No other mention is made in the petition of any specific claim by any particular tribe or band that was a party to any of the ratified treaties mentioned in clause (a) of the jurisdictional act which is claimed to have arisen under or to have grown out of any of the ratified treaties, or which may have arisen under or grown out of any Executive Order or acts of Congress which may have violated any of such ratified treaties. The above-quoted allegations from pars. 11, 12, and 13 of the petition appear to be the sole basis for the claim, or claims, for "damages" made on behalf of the Umpqua, Chinook, Clatsop, and Ne-ha-lum tribes, the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and

the Siletz Confederated Tribes of Indians. The petition does not allege and the proof does not show the names of the various tribes and bands from which the last-mentioned three confederated tribes were formed, or which of said predecessor tribes and bands of these confederated tribes had ratified treaties with the Government and which predecessor tribes had not.

The allegations of the petition are, therefore, not sufficient under the terms of the jurisdictional act and the rules of this court to constitute a cause of action against the United States by the last-mentioned seven tribes, made parties plaintiff in the petition, and, notwithstanding this defect in the petition, the evidence submitted is not sufficient to show that any of these seven tribes have a legal or equitable claim for compensation against the United States.

The claims which seem to be made on behalf of these seven plaintiff tribes and, also, one phase of the claims made on behalf of the tribes and bands of plaintiffs Tillamooks, Coquilles, Too-too-to-neys, and Chetcos appear to be grounded upon the assertion made in proposed findings and briefs of plaintiffs that by the Executive Order of November 9, 1855, the Coast Reservation, consisting of an area 120 miles north and south along the coast of Oregon by 20 miles east and west, composed in part of lands to which the bands of the Tillamooks formerly owned and held original Indian title, was, by the terms of the Executive Order, legally and permanently created as a reservation for the sole exclusive use and occupancy of the Coast, Umpqua, and Willamette Valley tribes of Indians; that the placing on said reservation of Indians not belonging to the Coast, Umpqua, or Willamette tribes constituted a taking in part of the lands legally belonging to said Coast tribes; and, also, that the reductions as set forth in the findings of said originally defined Coast Reservation by Executive Order of December 21, 1865 and the act of Congress of March 3, 1875 constituted an unlawful taking without just compensation of lands belonging to said Coast and Umpqua tribes of Indians. It is admitted that the Willamette tribes were not placed on the reservation.

These contentions made on behalf of all plaintiffs with

respect to beneficial ownership (other than rights based on original Indian title) through alleged exclusive use and occupancy rights in and to the whole of the Coast Reservation, as described under Executive Order of November 9, 1855, cannot be sustained under the terms and conditions of that Executive Order, and the conditions under and the extent to which Congress subsequently in 1875 recognized and ratified said Executive Order.

The unratified treaty dated August 11, 1855, mentioned in clause (b) of the jurisdictional act, which was made with and signed by the tribes and bands of Tillamooks, Sinslaus (Siuslaw), Umpquas, Kowes Bay (Coos Bay), Coquilles, Too-too-to-neys, and the Chetcos, undertook to cede outright to the United States, for the considerations mentioned therein, all lands to which these tribes and bands claimed original Indian title; and it contained a provision immediately following such cession, in art. 1, that so much of the country described therein as ceded as was contained in certain boundaries subsequently specified "shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, and such other bands or parts of bands as may, by direction of the President of the United States, be located thereon." Then followed the provision that "Such tract for the purpose contemplated shall be held and regarded as an Indian reservation, to wit: * * *. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use of such Indians as are, or may hereafter be, located thereon; * * *." The intent and purpose of these provisions was to make the whole of such "reservation" public land of the United States subject to use for Indian purposes, to the extent deemed advisable, subject to future reduction; and even if this treaty had been ratified the original tract referred to as a residence or reservation would have been subject to reduction without compensation since under the terms of the cession it would have belonged entirely to the United States and set apart, as stated, for the Indians "until otherwise directed." The Executive Order of November 9, 1855, issued after the treaty had been signed, and all actions thereunder treated this land as public land.

When various other treaties made with various Indian tribes in Oregon were transmitted to the Senate in 1855 for consideration and action, the treaty of August 11, 1855 with certain of the tribes and bands above-mentioned was accidentally and unintentionally overlooked and not transmitted to the Senate until February 11, 1857. In the meantime, and during the period April 18 to October 29, 1855, as shown in finding 13, General Palmer, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office recommended to the Secretary of the Interior for the approval of the President the conditional creation of "A large reservation of land, for the Coast, Umpqua, and Willamette Tribes of Indians of Oregon Territory, as shown by the blue shaded lines on the enclosed diagram taken from the general map" received by the Commissioner of Indian Affairs from General Palmer. The map referred to is in evidence as exhibit 14 to stipulation No. 1. General Palmer had recommended the creation of this conditional reservation on April 18, before he negotiated the 1855 treaty in August. When he made the treaty, the conditional reservation therein mentioned conformed substantially with his earlier recommendation. The proposed conditional reservation was recommended and created in anticipation that Indian title to the land included therein would be purchased from and ceded by the Indians by the treaty to be negotiated with them and would be, after the issuance of such order, treated as public land of the United States temporarily in use for Indian purposes.

In a letter of October 29, 1855 to the Secretary of the Interior (finding 13), the Commissioner of Indian Affairs explains in detail that the authority for creation of the proposed conditional reservation by Executive Order was simply a withdrawal of land from public settlement for the time being.

In a letter of November 8, 1855, the Secretary of the Interior submitted to the President for his approval a "proposed reservation for Indians on the coast of Oregon Territory" as had been recommended, and further stated to the President as follows:

> Before submitting the matter to you I desired to have a full report of the subject from the Indian Office, and

> the letter of the head of that Bureau of the 29th ultimo having been received and considered, I see no objection to the conditional reservation asked for, subject to future curtailment if found proper, or entire relief thereof should Congress not sanction the object rendering this withdrawal of the land from white settlement at this time advisable.

The Executive Order of November 9, 1855, issued pursuant to and in accordance with this letter, stated that "The reservation of the land within the blue shaded lines is hereby made for the purposes indicated in the letter of * * * the Secretary of the Interior of the 8th November 1855."

It will be seen from the above that the reservation of land for Indians was, as stated in the Executive Order, a conditional reservation or a withdrawal of public land from white settlement, subject to future curtailment or reduction if found proper by the President or to entire withdrawal as a reservation for Indians should Congress not sanction, as advisable, the object which rendered the withdrawal from white settlement of the land within the area of the reservation described.

Subsequent actions by the President in the Executive Order of December 21, 1865, and by Congress in the acts of March 3, 1875 (18 Stat. 420), February 8, 1887 (24 Stat. 388), August 15, 1894 (28 Stat. 286, 323), and May 13, 1910 (36 Stat. 367), show that the President and the Congress at all times until 1894 regarded the original "Coast Reservation" described by the Executive Order of November 9, 1855 to be a conditional or temporary reservation for Indian purposes through withdrawal by the President of the land therein from white settlement for the time being, but subject to future curtailment or diminution for purposes of public settlement if the President or the Congress deemed it desirable or advisable to make such curtailment. Therefore none of plaintiff Indian tribes or bands placed on the Coast Reservation, including the Tillamooks tribe, became entitled under and by virtue of the terms and conditions of the Executive Order of November 9, 1855 to recover compensation as for a taking of land to which they had exclusive use and occupancy title under approval and recognition by Congress, when the Coast Reservation, as originally de-

fined by said Executive Order, was subsequently in 1865 and 1875 curtailed or diminished. *Sioux Tribe of Indians* v. *United States*, 94 C. Cls. 150, affirmed 316 U. S. 317. Congress did not prior to 1894 recognize or approve the so-called Coast Reservation as originally created by Executive Order of November 9, 1855, or as diminished by Executive Order of December 21, 1865, and the act of March 3, 1875, *supra*, as a reservation of land for the sole and exclusive use and occupancy by the Indians thereon in such way or to such extent as would give them beneficial ownership of, or use and occupancy title to, any portion thereof, until the passage of the general allotment act of February 8, 1887, *supra*, and the acts of August 15, 1894, (28 Stat. 286, 323 (sec. 15)); May 13, 1910, *supra*, and May 18, 1916, 39 Stat. 123, 149.

On and after enactment of sec. 15 of the act of August 15, 1894, *supra*, Congress approved and recognized the Coast or Siletz reservation as it existed immediately prior thereto as beneficially belonging to the Indians thereon. After this act of August 15, 1894, approving an agreement ceding 178,-840 acres for $142,600, Congress did not take any part of the reservation without compensation, but by that act and under sec. 3, act of March 3, 1871 (16 Stat. 544, 570), it recognized the reservation as belonging to the Indians thereon.

From these conclusions, it results that the Umpqua, Chinook, Clatsop, and the Ne-ha-lum tribes and the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians are not entitled to recover.

Moreover, and in any event, the Umpqua Tribe is not entitled to recover because it is expressly excluded under clause (b) of the jurisdictional act. The Chinook, Clatsop, and Ne-ha-lum tribes are not entitled to recover as for a taking of lands to which they may have had original Indian title for the further reason that their unratified treaties made in 1851 are not included in the jurisdictional act, and also for the reason that under the acts of June 7, 1897, 30 Stat. 62, and August 24, 1912, 37 Stat. 518, 535, they were paid various sums by Congress which were accepted by them

in full of all demands or claims against the United States. *Klamath and Moadoc Tribes of Indians et al.* v. *United States*, 296 U. S. 244. The Willamette Tribe of Indians or the "Confederated Bands of Indians of the Willamette Valley" as they were known and designated in a ratified treaty with them dated January 22, 1855, 10 Stat. 1143, were not brought to or placed upon the Coast Reservation, and they cannot, therefore, sue under clause (a) or (b) of the jurisdictional act or under the Executive Order of November 9, 1855.

The evidence does not show of or from what tribes or bands the Confederated Tribes of the Grand Ronde Community, the Willamette Confederated Tribes, and the Siletz Confederated Tribes, made plaintiffs herein, were composed or organized; neither does the evidence show when the Indians, from which the so-called Confederated Tribes of the Grand Ronde Community and the Siletz Confederated Tribes were organized, were moved to or placed upon the Coast Reservation, other than that the Rogue River and Chasta Indians, who appear to have belonged to the so-called Siletz Confederated Tribes, were placed thereon in May 1857.

The petition is therefore dismissed as to the following plaintiffs: The Umpqua, Chinook, Clatsop, and Ne-ha-lum tribes, the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians.

The next question involves the right of the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes to recover compensation on the basis of original Indian title to the lands which they claim the Government took in November 1855, or soon thereafter.

Counsel for defendant do not deny that the United States took Indian title to the lands involved to the extent that the Indians may have had such title, but they contend, first, that if it be assumed that each of the four tribes above-mentioned has proven original Indian title through use and occupancy to the exclusion of other Indian tribes of the lands claimed by them they are not entitled to recover com-

pensation therefor for the reason that no right, title, or interest in, to, or upon the whole or any part of such lands as against the sovereign rights of the United States may be acquired by an Indian tribe or be recognized by the court as a basis for judgment in the absence of specific Congressional recognition of beneficial ownership through original title; and, that the United States has never recognized any of these plaintiffs as having such a right, title, or interest in, to, or upon any lands so occupied by them. In support of this contention counsel cites, among others, the opinions of this court in *Coos Bay Indian Tribes et al.* v. *United States*, 87 C. Cls. 143; *Duwamish et al.* v. *United States*, 79 C. Cls. 530; and *The Wichita Indians et al.* v. *United States*, 89 C. Cls. 378, 416.

Before analyzing these cases we will discuss the above contention in the light of other decided cases and the history of the aboriginal right or title of Indian tribes in and to property exclusively possessed by them, as uniformly recognized by the United States.

The contention of counsel for defendant is but another way of saying that an act authorizing suit on original Indian title simply provides a forum and that Indians cannot recover compensation from the United States as for a taking of their original possessory title to lands unless such title to the area, with respect to which claim is made, has been expressly recognized or conceded by the United States through some treaty, agreement, or act of Congress.

From the standpoint of the legal and equitable nature of a claim and the legal principles applicable thereto, the fundamental right of an Indian tribe to recover compensation for having been deprived by the United States of the beneficial aboriginal ownership of land is no different in a case where the United States has consented to be sued on the basis of original Indian title from a case where the United States has consented to be sued on the basis of a claim arising under or growing out of a treaty, agreement, or act of Congress, except in the nature and degree of proof required to establish use and occupancy title. Where consent to be sued on the basis of original Indian title has been given, as in this case, occupancy of these Indians to the exclusion

of other tribes necessary to establish aboriginal possessory title is a "question of fact to be determined as any other question of fact." *United States, as Guardian of the Hualpai Indians of Arizona*, v. *Santa Fe Pacific Rail-Road Co.*, 314 U. S. 339. Cf. *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347; *Coos (or Kowes) Bay, Lower Umpqua (or Kalawatset), and Siuslaw Indian Tribes* v. *The United States*, 87 C. Cls. 143. But where the consent to be sued is limited to a claim, or claims, arising under or growing out of a treaty, agreement, or act of Congress, proof of aboriginal use and occupancy title is not necessary where such treaties, agreements, or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been or is set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476. In the case of a treaty title, the Indians concerned simply reserve, by specific recognition in the treaty, their original title to certain of their lands, or acquire exclusive use and occupancy title to other lands, in exchange for lands to which they had held original Indian Title. Where the consent to be sued is limited to claims arising under or growing out of a treaty, and the treaty relied upon is only a treaty of peace and amity and does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the court is without authority to determine, adjudicate, and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530. *The Crow Nation or Tribe of Indians of Montana* v. *United States*, 81 C. Cls. 238; *The Wichita Indians, et al.* v. *United States*, *supra;* and *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 C. Cls. 642, affirmed March 12, 1945, 324 U. S. 335. And even if the proof is sufficient, in a case where the right to sue is limited to claims arising under or growing out of treaties, to show that the tribe or tribes concerned had original Indian title through use and occupancy to the exclusion of other Indian tribes, the court cannot enter judgment on the basis of such original title.

The Northwestern Bands of Shoshone Indians v. *United States, supra; Duwamish, et al.* v. *United States, supra; The Wichita Indians, et al.* v. *United States, supra.*

Ever since the Government of the United States was first established the United States through its legislative and executive departments has, with one qualified exception in the case of the Indians of California, consistently conceded and recognized that Indians had a beneficial possessory ownership in lands used and exclusively occupied by them, notwithstanding general consent to be sued by the Indians on the basis of such original occupancy title or on a treaty title was not given. *Johnson and Graham's Lessee* v. *William M'Intosh*, 8 Wheat. 543; *Cramer et al.* v. *United States*, 261 U. S. 219; *United States* v. *Santa Fe Pacific R. R. Co., supra.*

In practically all instances the special consent given by Congress from time to time to particular tribes to sue the United States has been limited to claims arising under or growing out of treaties, agreements, or acts of Congress, but in *Johnson* v. *M'Intosh, supra*, the court held, p. 574, that the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." This case further pointed out that the character of the Indians inhabiting this country and their mode of life and subsistence were such that it was not practicable for them to be incorporated with the people of the victorious nation that had discovered and was taking possession of the continent and become subjects, or citizens, of the Government, with whom they were connected, in accordance with the general rule dictated by humanity and a wise policy which requires "that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish

the painful sense of being separated from their ancient connections, and united by force to strangers."

The hundreds of treaties and agreements made with Indian nations or tribes, commencing as early as 1778, all indicate, to a greater or lesser degree, a complete recognition by the United States of the legal principle established by the cases last-above cited. The provisions of sec. 8, art. 1 of the Constitution giving to Congress power to regulate commerce with the Indian tribes and the practice of the Government over a long period of years in making treaties with such tribes under sec. 2, art. 2 of the Constitution seem to have been predicated upon the principle that the Indians had a beneficial ownership in lands occupied, used, and exclusively possessed by them, and that such right of occupancy through aboriginal possession should, in order to give the United States full legal ownership, be extinguished by purchase through ratified treaties, agreements, or acts of Congress made and enacted pursuant to the power of Congress over the property and affairs of Indian tribes for their benefit.

In *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 345–347, the court said:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad*, *supra*.
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> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States*, 261 U. S. 219, 227. This policy was first recognized in *Johnson* v. *M'Intosh*, 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Chouteau* v. *Molony*, 16 How. 203; *Holden* v. *Joy*, 17 Wall. 211; *Buttz* v. *Northern Pacific Railroad*, *supra; United States* v. *Shoshone Tribe*, 304 U. S. 111. As stated in

Mitchel v. *United States*, *supra*, p. 746, Indian "right of occupancy is considered as sacred as the fee simple of the whites." Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Thought the *Cramer* case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from "the original nomadic tribal occupancy." (p. 227.) Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson* v. *M'Intosh*, *supra*, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations, including Spain, that, like other rules governing titles to property (*United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 486–487) they should now be considered no longer open. * * *.

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U. S. at 229.

If, in a suit by Indians against the United States pursuant to a special jurisdictional act, evidence of direct recognition by the United States that the Indians had property rights or a beneficial ownership in lands based on original Indian title through exclusive possession and occupancy of such lands were necessary, it would be sufficient in the case at bar to point to the act of August 14, 1848, 9 Stat. 323, which made all land laws of the United States applicable to the Territory of Oregon thereby created, and in section 1 stated that nothing therein contained "shall be construed to impair the rights of person or property pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, * * *." Further, in an opinion on the question of original Indian title to lands and the right of settlement thereon as public lands, the Attorney General on June 5, 1855 (7 Op. Atty. Gen. 293, 299), stated and

held that "There is one other idea suggested by the Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law."

The United States, of course, possessed power, whether or not its action was just and legal from the standpoint of fundamental property rights of Indians, to deprive the Indians, by force or otherwise, of their property rights in and beneficial ownership of lands occupied by them, and to move them about as it pleased, and in the absence of a consent by the United States to be sued the courts cannot interfere or adjudicate a claim for compensation on the basis of such action; the only recourse of the Indian in such a case being to petition Congress for relief. But the situation is entirely different where, as in a case like the present one, Congress has given the consent of the United States to be sued on claims for compensation based on original Indian title or rights in, to, or upon lands occupied by them arising under or growing out of such action by the United States. When such consent to be sued has been given, ordinary principles of law and equity, so far as applicable, govern the rights of the parties.

It will be found upon analysis that the cases in this court hereinabove mentioned and chiefly relied upon by the defendant do not support the contention that recovery cannot be had on the basis of original Indian title unless and until Congress has specifically recognized such title.

The jurisdictional act in the *Coos Bay Indian Tribes et al.*, *supra*, chiefly relied upon by defendant, like clause (b) of the jurisdictional act in the present case, authorized the Indians to bring suit on claims growing out of original Indian title, and the court assumed in deciding the case that if plaintiff tribes had established by sufficient evidence

such original Indian title through exclusive use and occupancy they would be entitled to recover compensation, but held that the evidence submitted in that case was not sufficient to establish such title to the area claimed, or to any definite portion thereof. The statement by the court in its opinion that the United States had never recognized the Coos Bay and other Indian tribes, plaintiffs in that suit, as the aboriginal owners of lands to which they made claim had reference to the proposition that since plaintiffs had not established aboriginal use and occupancy title they were not otherwise entitled to recover as for a taking of such lands by the Government, because the Government had not specifically recognized by treaty, agreement, or act of Congress, beneficial ownership of the Indians through their exclusive right to use and occupy the whole or any portion of the lands for which claim was made.

In the case of *The Duwamish et al. Tribes*, *supra*, the suit was brought under a jurisdictional act, sec. 1 of which provided for adjudication of claims arising under or growing out of certain treaties or acts of Congress, and did not authorize the prosecution of a claim based on aboriginal Indian title. The portion of the opinion in that case relied upon by counsel for defendant discussed sec. 2 of the jurisdictional act which the Indians claimed had enlarged the jurisdiction conferred by sec. 1, and simply pointed out that the Indians as a tribe were *vested with no right to sue the United States* for the taking of their lands until subsequent to the conclusion of treaties which fixed their landed domain, and *only then by special jurisdictional acts of Congress* in cases where allegations prevailed that treaty-stipulations had not been observed, or that acts of Congress had deprived them of lands included in their reservations. The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title.

The opinion in the case of the *Wichita Indians*, *supra*, held that the claims asserted under certain treaties or acts of

Congress, as authorized by the jurisdictional act, could not, on the evidence, be sustained, and that a claim based solely on aboriginal Indian use and occupancy title was not within the terms of the jurisdictional act.

In the case of *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, in which the jurisdictional act authorized suit on the basis of original Indian title, we held that the Indians would be entitled to recover for the taking of their lands if they were able to prove that they held original title through exclusive use and occupancy, but it was held that they had not proved such exclusive occupancy title.

We are therefore of opinion that plaintiffs Tillamook, Coquille, Too-too-to-ney, and Chetco tribes are entitled as a matter of law to recover compensation if they have proven by satisfactory evidence that they held and owned original Indian occupancy title to the exclusion of other Indian tribes to the lands of which they were deprived and which were taken by the United States without payment of compensation, and this is the final question in the case. Counsel for defendant, relying upon the *Coos Bay et al.* case, *supra*, contend that original Indian title has not been established by the proof.

From a careful study of the evidence submitted, a great deal of which is documentary, we are of opinion that these four tribes have satisfactorily established original Indian title through exclusive use and occupancy in 1855, and long prior thereto, to the lands specifically described in findings 8, 9, and 10.

On this question, counsel for the Government contend that although defendant is satisfied that the four tribes mentioned were living during and prior to 1855 in the general area of the lands claimed by them, defendant does not concede that these plaintiffs, or any of them, exclusively occupied the lands which they claim in such a manner or to such an extent as would create or would be considered a possession, either actual or constructive.

The four plaintiffs above mentioned have submitted a great deal more and much stronger evidence than was before the court in the *Coos Bay* case in which the court had to rely principally upon oral testimony which it found insufficient to

establish the claimed original title through exclusive use and occupancy. No useful purpose would be served by discussing in detail the evidence submitted in this case—reference to the principal portions thereof will be sufficient.

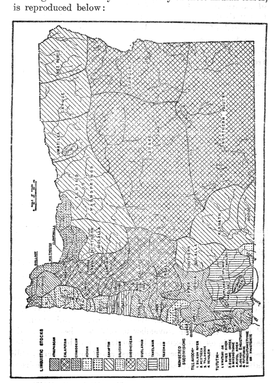
The investigations and reports made and submitted in 1855 by Indian Superintendent Joel Palmer under and pursuant to direction and instruction of the President, through the Commissioner of Indian Affairs, substantially support the claim made by the Tillamooks, Coquille, Too-too-to-ney, and Chetco tribes in respect of the lands for which they claim compensation and to which they claim to have held original Indian title in 1855 and long prior thereto. He found and reported that these tribes and bands occupied areas with definite boundaries, and the proof which has been submitted in this case satisfactorily shows where these definite boundaries were with respect to the tribes composed of the bands mentioned in the petition. General Palmer's investigations and reports not only recognized the extent of occupancy by these tribes, but he also concluded that by such occupancy they had acquired original Indian title. Other evidence which has been submitted in the case fully supports this view and further shows that as far back as history can be traced, at least to 1750, there had been practically no change in location of plaintiff tribes and bands along the Oregon Coast, and east to the Coast Range Mountains; and that these tribes and bands held, occupied, and used such lands within rather definite boundaries to the exclusion of and in recognition by other tribes and bands. The proof satisfactorily shows that plaintiff tribes of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos lived upon, claimed, and occupied these lands in Indian fashion to the extent that Indian tribes and bands usually exclusively used and occupied lands prior to 1855 and as far back as the history of these tribes and bands can be traced.

The written report prepared by the Secretary of the Interior in the case at bar from the records and documents in the possession of the Government, which report is filed as evidence in this case, states that the lands which the Indians undertook to cede in the unratified treaty of August 11, 1855,

Opinion of the Court

and for which these plaintiffs make claim, appear to have been in the exclusive possession of the Indians.

A map showing tribal distribution of Indians in Oregon, including the Coast tribes, among which were plaintiffs Tillamook, Coquille, Too-too-to-ney, and the Chetco, prepared by the American Anthropological Association after investigation and study of the history of these Indian tribes, is reproduced below:



The conclusion reached by this Association from its investigation and research, as disclosed by its official records, shows that this tribal distribution represented a fairly stable condition which had existed from about 1750.

In addition to the foregoing, we have in this case the testimony of Dr. John P. Harrington of the Smithsonian Institution, an eminent ethnologist of a quarter of a century of service in the Bureau of American Ethnology, in connection with the investigations and studies he had made and completed of the Oregon Indians, including the Oregon Coast Indians and plaintiff tribes of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos. Dr. Harrington testified that from an investigation and study of the history of the Indians of the Oregon Coast and their holdings he had been convinced beyond any shadow of a doubt that these tribes and bands of Indians which fringed the Coast were the ancient and original inhabitants, and that if an investigation had been made centuries before the expedition of Lewis and Clark the tribal holdings would have been to all intents and purposes where they were at the dawn of history.

The defendant has submitted no evidence to contradict or overcome this strong and direct evidence which has been submitted on behalf of these plaintiffs in support of their claim of original Indian exclusive use and occupancy title of the lands for which they claim compensation.

These plaintiffs are therefore legally and equitably entitled to recover compensation from the defendant for the taking of lands, as set forth and described in findings 8, 9, and 10, to which they have shown they held original Indian title from time immemorial.

As to the date or dates of taking of these lands by the defendant, the following is established by the evidence submitted:

To all intents and purposes, and as a matter of established fact, the United States considered soon after the unratified treaty dated August 11, 1855, was made and when the Executive Order of November 9, 1855, was issued that the lands claimed and occupied by the tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos were public lands for such purposes as the United States might desire to

use them—namely, for public homestead and settlement, and for temporary use for Indian purposes.

The executive officers of the Government, of course, thought and assumed that the treaty which was being negotiated, and which was made and signed with these four tribes between August 11 and September 8, 1855, and before the Executive Order of November 9, 1855, would be ratified by the Senate but they did not await ratification before taking the lands, but proceeded immediately after the treaty was signed to regard and to treat the lands claimed by the Tillamooks, Coquilles, Too-too-to-neys, and the Chetcos as public lands open to public homestead and settlement, except as conditionally withdrawn and reserved by the Executive Order of November 9, 1855. This action, subsequently confirmed by Congress, was a taking of the lands and the original Indian use and occupancy title. Such action was not altered but was confirmed and continued when it became known that the treaty dated August 11, 1855, would not be ratified. Such actions were known to, acquiesced in, and ratified by Congress, as hereinafter set forth.

The tribes and bands of the Coquilles, Too-too-to-neys, and the Chetcos were entirely moved off their lands about November 9, 1855, or soon thereafter, and placed on a portion of the land to which the tribe and bands of Tillamooks held original Indian title. The lands of the Coquille, Too-too-to-ney, and Chetco tribes were therefore unquestionably taken at that time.

The bands composing plaintiff Tillamooks tribe were not altogether moved off their land, but they were moved and confined to the conditional reservation created by the Executive Order of November 9, 1855, along with other Indians of various other tribes and bands, and such of the land of the Tillamooks tribe as lay east of the eastern boundary of this conditional reservation was taken November 9, 1855. This conditional reservation for Indian purposes was, as has been stated, composed in part of a portion of the land to which plaintiff tribe and bands of Tillamooks held original Indian title and which they continued to occupy jointly with other Indians; this land of the Tillamooks was also taken by the United States at the same time the other lands above-

mentioned were taken. The land composing the reservation was treated and regarded from November 8, 1855 as public land of the United States subject to be opened for public settlement as the President or Congress might direct, and most of it was subsequently so opened for settlement.

The above-described actions of the Executive officers of the Government, dating from November 9, 1855, in carrying out the Executive Orders of 1855 and 1865, were ratified and confirmed by Congress by the passage of the act of March 3, 1875, 18 Stat. 420. This ratification of the 1855 and 1865 Executive Orders confirmed the original taking as of November 9, 1855. The land originally belonging beneficially to the tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos through original Indian title was therefore taken on November 9, 1855. *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* v. *United States*, 82 C. Cls. 23; 299 U. S. 476; and 85 C. Cls. 331; 304 U. S. 111.

The compensation to which these tribes are entitled should therefore be measured by the value of the lands described in findings 8, 9, and 10 on that date, plus an additional amount measured by a reasonable rate of interest to make just compensation. However, these four tribes are not legally and equitably entitled to recover the entire value above mentioned, since those values must be offset as of November 9, 1855 by the values as of that date of their interests in the land comprising the reservation on August 15, 1894, of which interests the Indians of these tribes then became the beneficial owners through recognition by Congress on the basis of allotments in severalty which had been made and on the basis of population as to unallotted lands or proceeds therefrom. In effect, and for all practical purposes, these Indians, so far as their right to compensation is concerned, had had these occupancy interests (first recognized on August 15, 1894, as being exclusive as against the United States) in the land of the reservation from the date of taking in November 1855, but the extent of such interests were, until 1894, uncertain, indefinite, and legally indeterminable until Congress by the act of

August 15, 1894, ratifying an agreement of purchase by the United States of a portion of the then existing reservation, recognized the Indians on the then existing reservation as being the beneficial owners thereof. This act of 1894 was a recognition by ratification as of November 9, 1855 of such interests as the Indians had in 1894, and which interests they had actually enjoyed through occupancy since 1855. The values as of November 9, 1855 of such interests as these plaintiffs had on August 12, 1894 are therefore proper legal and equitable offsets against the values of the lands taken in November 1855.

Although the Tillamooks originally held Indian title to their interest in the reservation as it existed in 1894, such title had been taken in 1855, but they were not deprived of possession to the extent of that interest, and their exclusive use and occupancy title to such interest again became vested and determinable in 1894.

As to the Coquilles, Too-too-to-neys, and the Chetcos, their exclusive use and occupancy interests in the reservation, which became vested by recognition in 1894, represented an equitable consideration in part for their lands which had been taken by the Government in 1855, and which interests they had enjoyed through actual occupancy since the date of taking of their lands about November 9, 1855.

Judgments for the amount of compensation to which plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos may be entitled and the determination of the amount of offsets, in addition to those above-mentioned, if any, are reserved for further proceedings under rule 39 (a).

It is so ordered.

MADDEN, *Judge;* and WHITAKER, *Judge*, concur.

WHALEY, *Chief Justice*, dissents.

JONES, *Judge*, took no part in the decision of this case.

Syllabus

HORACE HAVEMEYER v. THE UNITED STATES

[No. 45775. Decided April 2, 1945]*

On the Proofs

Gift tax; method of determining fair market value of large blocks of stock.—For the purpose of the gift tax, under section 506 of the Revenue Act of 1932 (47 Stat. 169), a taxpayer may submit evidence to prove that the actual fair market value of a large block of corporation stock made the subject of a gift on a certain date was less than the mean between the highest and lowest selling prices of a comparatively small number of shares of such stock on the New York Stock Exchange on such date. *Helvering* v. *Safe Deposit and Trust Company of Baltimore*, 35 B. T. A., 259, 263, affirmed 95 Fed. (2d) 806, cited. Cf. *Groff* v. *Smith*, 34 Fed. Supp. 319, 322, 323.

Same; evidence as to fair market value.—Evidence that the fair market value of stock, a large block of which was the subject of a gift on a certain date was less than the price quotations, by reason of the number of shares involved, should be given consideration for gift tax purposes, together with the market quotations and other relevant facts. *Helvering* v. *Maytag*, 125 Fed. (2d) 55; *Henry F. du Pont* v. *Commissioner*, 2 T. C. 246.

Same.—In the ascertainment of value "there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Standard Oil Company of New Jersey* v. *Southern Pacific Corporation et al.*, 268 U. S. 146, 156.

Same; ascertainment of fair market value.—Where two blocks of stock, one of 160,000 shares and the other of 20,000 shares, had, respectively, a market price of $28.15 per share and $24.50 per share, representing the mean between the highest and lowest quoted selling prices as of the date of the gift; and where it is found that the dumping of either block of such stock upon the market at one time would have depressed the price; it is *held*, upon the evidence adduced, that the reasonable value, for gift tax purposes, was $25 per share for the one block of stock and $22 per share for the other block, and plaintiff is entitled to recover.

Same; claim for refund; statute of limitation.—Where taxpayer made gifts in 1934, on which he paid a gift tax on March 14, 1935, and a deficiency assessment on July 13, 1937; and where taxpayer made additional gifts in 1938, on which he paid a gift tax on March 15, 1939; and where, on June 13, 1939, he filed a claim for refund based on overvaluation of certain

*Defendant's petition and plaintiff's petition for writ of certiorari denied.

stocks comprising a part of the 1934 gift, the refund claim exceeding the amount of taxes paid on the 1934 gifts within three years of the date of filing the claim but not exceeding the amount of the gift taxes paid by him within three years of the date of the refund claim if the taxes on the 1938 taxes could be reached by the claim for refund on the 1934 gifts; it is *held* that the gift tax is an annual tax and that refunds on the 1934 gift tax can be recovered only to the extent that taxes on gifts for that year were actually paid within three years of the date of filing the claim for refund.

The Reporter's statement of the case:

Mr. Preston B. Kavanagh for plaintiff.

Mr. William M. Sperry, 2nd, was on the brief.

Mr. Francis T. Donahoe, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Fred K. Dyar and *Mr. John A. Rees* were on the brief.

Plaintiff sues to recover $244,324.01 with interest, alleged overpayment of gift tax for 1934. Two of the three questions presented relate to (1) the method of determining the fair market value of two large blocks of stock made the subject of a gift by plaintiff on the same day; and (2) the fair market value on the date of the gift of such blocks of stock of 160,000 shares of the Great Western Sugar Company and 20,000 shares of the South Porto Rico Sugar Company.

The defendant insists upon a market value of $28.125 a share for the block of 160,000 shares and $24.50 a share for the block of 20,000 shares on the basis of the mean between the highest and the lowest quoted selling prices of the stocks of the corporations mentioned on the New York Stock Exchange on the date of the gift, while plaintiff insists that the fair market values a share at which the total number of shares of each of the large blocks of stock could have been sold on the date of the gift were less than the mean between the high and low quoted selling prices on the Stock Exchange, and that such actual fair market values of the blocks of stock in question were $25 a share for the 160,000 shares and $22 a share for the 20,000 shares.

The third question relates to the statute of limitation on claims for refund of gift taxes.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. November 19, 1934, plaintiff, a citizen and resident of New York, made certain gifts to and in trust for the benefit of his four children. Included among those gifts were 160,000 shares of the common stock of Great Western Sugar Company (hereinafter sometimes referred to as "Great Western") and 20,000 shares of the common stock of South Porto Rico Sugar Company (hereinafter sometimes referred to as "South Porto Rico").

2. March 14, 1935, plaintiff filed a Federal gift tax return for 1934, which included the gifts made on November 19, 1934, referred to in the preceding finding. That return showed gross gifts valued at $10,279,339.77, net gifts of $10,184,339.77, and a total gift tax due thereon of $2,373,-878.82. Plaintiff paid this tax March 14, 1935.

The return reported gifts of stocks and bonds on November 19, 1934, to the following individuals of the following values:

	Value at date of gift Nov. 19, 1934
Doris Havemeyer Trust	$2, 186, 833. 25
Adaline Havemeyer Trust	2, 186, 833. 25
Horace Havemeyer, Jr. Trust	939, 141. 25
Harry W. Havemeyer Trust	2, 554, 952. 64
Doris Havemeyer	367, 791. 13
Adaline Havemeyer	367, 370. 13
Horace Havemeyer, Jr	1, 615, 251. 46

Included as a part of the gifts set out above were 160,000 shares of no par common stock of Great Western Sugar Company and 20,000 shares of no par common stock of South Porto Rico Sugar Company. The Doris, Adaline, Horace, Jr., and Harry W. Havemeyer Trusts each received 40,000 shares of the Great Western stock and 5,000 shares of the South Porto Rico stock. The Great Western stock was reported at a value of $28.125 a share in an aggregate total of $4,500,000, and the South Porto Rico stock was reported at a value of $24.50 a share in an aggregate total of

$490,000. These two stocks were listed on the New York Stock Exchange and the unit prices used in valuing the stock in the gift tax return represented the mean between the highest and lowest quoted selling prices upon the date of the gift. The Commissioner's gift tax regulations in effect at that time contained the following provision with respect to the valuation of stocks and bonds: "The value of stocks and bonds listed on a stock exchange should be determined by taking the mean between the highest and lowest quoted selling prices upon the date of the gift, except where such selling prices do not reflect the fair market value of the gift."

3. July 13, 1937, plaintiff paid a further gift tax of $23,-433.53 plus interest of $3,252.12, a total of $26,685.65. That additional gift tax and interest arose by reason of adjustments in the 1934 return by the Commissioner of Internal Revenue in the values of certain of the gifts made November 19, 1934, but no adjustments were made by the Commissioner with respect to reported values of the gifts of Great Western and South Porto Rico stocks.

4. During 1938 plaintiff made further gifts to the children named in finding 2, and on March 15, 1939 filed a gift tax return for 1938 which showed not only the gifts made during that year but also the total gifts heretofore referred to as made in 1934. That return showed gross gifts in 1938 to plaintiff's four children valued at $629,122.97, and net gifts for that year to the same parties valued at $609,122.97. The gift tax shown due on that return was computed as follows:

Amount of net gifts for 1938	$609, 122. 97
Total amount of net gifts for preceding years	10, 264, 290. 61
Total net gifts	10, 873, 413. 58
Tax computed on total net gifts	4, 160, 840. 32
Tax computed on net gifts for preceding years	3, 854, 756. 03
Tax on net gifts for 1938	306, 084. 29

Plaintiff paid the gift tax of $306,084.29 shown due for 1938 on March 15, 1939.

5. June 17, 1939, plaintiff filed a claim for refund of $244,324.01 on account of an assessment of gift taxes in the

amount of $2,703,396.64 which was paid March 14, 1935, July 13, 1937, and March 15, 1939, on gifts made in 1934 and 1938. The basis of the claim was that whereas a value of $28.125 a share was assigned to the 160,000 shares of Great Western common stock and a value of $24.50 a share to the 20,000 shares of the South Porto Rico common stock in the gift tax return for 1934, the fair market values of those stocks on November 19, 1934, were not more than $24 and $21.50 a share, respectively.

6. August 24, 1939, a Deputy Commissioner of Internal Revenue wrote plaintiff as follows:

> Reference is made to your claim filed June 17, 1939, for the refund of $24,324.01, Federal gift tax paid for the calendar years 1934 and 1938.
>
> Article 65 of Regulations 79, as amended, provides in part that a separate claim on Form 843 shall be made for each taxable year. You are therefore requested to submit separate forms for the calendar years referred to.
>
> As the amount of gift tax paid for the calendar year 1934 which was paid subsequent to June 16, 1936, is $23,433.53, the amount of refund for that year is restricted to that amount plus interest, the statute of limitations having tolled with respect to any payments made prior to that date.

September 6, 1939, counsel for plaintiff replied to the above letter as follows:

> Reference is made to your letter addressed to Mr. Horace Havemeyer, 99 Wall Street, New York, New York, under date of August 24, 1939.
>
> We are of the opinion that Title III of the Revenue Act of 1932, and its amendments impose but a single tax upon any donor. That tax is computed from time to time as such donor exercises his unquestionable right to give away such property as he may own, and is payable in installments as such right is availed of.
>
> The claim for refund filed on June 16, 1939, is in the sum of $244,324.01. Within three years prior to that date the donor had paid installments of said tax amounting in all to $329,517.82, together with interest on one such installment amounting to $3,274.02, or a total of $332,791.84. It is therefore apparent that the amount of refund claimed does not exceed the portion of the tax

> paid during the three years next preceding the filing of said claim for refund.
>
> We believe you are in error when you state that any part of the refund claimed is barred by the statute of limitations.

November 2, 1939, plaintiff wrote the Commissioner in part as follows:

> In accordance with the demand set forth in your letter of August 24th and repeated in your letter of October 14th, both addressed to the above-named taxpayer, there are herewith enclosed two claims for refund executed by said taxpayer, one entitled as of the year 1934, and the other entitled as of the year 1938, both relating to his claim to a refund of Gift Tax amounting to $244,324.01. By complying with said demand and filing these claims the taxpayer does not admit that separate gift taxes have been paid by him applicable only to said years.

7. The claims referred to in the last communication set out above were received by the Commissioner November 3, 1939. The claims were identical in all respects except that line 3 of one claim read: "Character of assessment or tax . . . Gift tax 1934"; whereas the same line in the other claim read: "Character of assessment or tax . . . Gift tax 1938". Each claim was in the amount of $244,324.01, and stated to be part of an assessment of $2,703,396.64 paid on March 14, 1935, July 13, 1937, and March 15, 1939. Each of the returns asserted an overpayment by reason of the overvaluation of the Great Western and South Porto Rico stock as set out in the original claim filed June 17, 1939, and each incorporated by reference the statements made in that claim. Each claim concluded with the following statement:

> The Commissioner of Internal Revenue, relying upon Article 65 of Regulations 79, has demanded that the claimant file separate claims for refund in respect to each such year. This claim, and the claim filed or intended to be filed contemporaneously herewith, is filed solely to comply with that demand, and to induce the Commissioner of Internal Revenue to take action upon the said claim for refund of Gift Taxes overpaid by the claimant, but by complying with said demand and filing said separate claims the claimant does not admit that separate Gift Taxes have been paid by him.

8. November 25, 1940, the Commissioner advised plaintiff as follows:

Reference is made to your claims for the refund of $488,648.02 ($244,324.01 for 1934 and $244,324.01 for 1938) Federal gift taxes paid.

Your claims are based on the contention that net gifts as determined for 1934 were excessive. It is therefore asserted that refunds are due for both 1934 and 1938.

Under date of June 17, 1939, you filed a claim for the refund of $244,324.01 Federal gift taxes paid for the calendar years 1934 and 1938. You were advised that under the provisions of Article 65 of Regulations 79 it would be necessary to file separate claims for each calendar year and that insofar as the calendar year 1934 was concerned all of the tax paid was barred from refund except $23,433.53, which amount was paid during the three-year period immediately preceding the filing of the claim for refund.

You responded by filing two separate claims, one for 1934 and one for 1938, each in the amount of $244,324.01. However, in the latter claim and in letters written to the Bureau you took the position that the gift tax is a single tax payable in annual installments and that since more than the amount of tax claimed to be refundable had been paid within the three-year period immediately preceding the filing of the claim, no part of the amount claimed as refundable was barred by Section 528 of the Revenue Act of 1932.

Your claims have been made the subject of conferences in the office of the Internal Revenue Agent in Charge, 2nd New York Division and in the office of the New York Technical Staff.

Your contention to the effect that the gift tax is a single tax payable in annual installments as gifts are made is not deemed to be meritorious. By the express provisions of Section 501 and Section 502 of the Revenue Act of 1932, the gift tax is made an annual tax computed on the basis of gifts made during the calendar year. It must be concluded, therefore, that your claim for refund insofar as it relates to the tax paid for the calendar year 1934 is barred by Section 528 of the Revenue Act of 1932, except as to payments made within the three-year period immediately preceding June 17, 1939, the date the claim was filed.

The evidence submitted by you in your claims and at the conferences granted is insufficient to warrant any

reduction in the values determined for the gifts made in 1934. Accordingly, this office adheres to such values.

Since the net gifts as determined for 1934 were not excessive, it necessarily follows that there has been no overpayment for the calendar year 1938 on that account.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, notice is hereby given of the disallowance of your claims in full.

9. The Great Western Sugar Company is a New Jersey corporation which was organized in 1905. It operates beet sugar refining plants in the beet producing areas of Colorado, Nebraska, Montana, and Wyoming. It purchases sugar beets from growers and processes them to produce refined sugar for the domestic market. In the crop year 1933–1934 Great Western produced about 32.6 percent of the beet sugar refined in this country. Refined beet sugar is chemically indistinguishable from refined cane sugar but, due to consumer prejudice of long standing and transportation costs, sells at a discount under cane of from 10 to 20 cents per hundred pounds. The principal marketing area for beet sugar is in the Middle West and Mountain States. It does not compete well with cane sugar in the East.

10. In 1934 and for many previous years, Great Western had outstanding 150,000 shares of 7 percent cumulative preferred stock, $100 par, and 1,800,00 shares of no-par value common stock. Earnings fluctuated widely during the early 1930's. For the five-year period 1930 to 1934, inclusive, the average net income a year was $2,656,000 and the average yearly earnings of shares of common stock were 89 cents. The average yearly dividends paid for the period were $1.08 on common shares and the average book value on common shares was $16.79. For the fiscal year 1934, the earnings on common shares were $2.98, the dividend was $1.20, and the book value $15.30. Surplus and current assets were reduced by $9,000,000 on November 15, 1933, by certain transfers of securities.

11. Both the preferred and common stocks of Great Western were listed and traded in upon the New York Stock Exchange. In 1932 the common stock had fallen to a depression low of something over three dollars a share but there-

after staged a substantial recovery. Actual sales of Great Western common stock on the New York Exchange for the periods indicated below were as follows:

(a) *Daily sales for the month of November, 1934*

Day of month	Number of shares sold	Open	High	Low	Close	Bid	Asked
Nov. 1	200	26⅝	26¾	26⅝	26¾	26⅝	27
2	1,000	27	27	26⅝	27	26¾	27
3	100	27¼	27¼	27¼	27¼	27⅛	28½
4	Sunday						
5	200	27⅝	28	27⅝	28	27¾	28
6	Election Day						
7	900	27¾	27¾	27¾	27¾	27⅝	28
8	3,800	28	29¾	28	28½	28½	28¾
9	1,800	28⅜	28¾	28⅜	28¾	28¾	29
10	400	28¾	29	28¾	29	28¾	29
11	Sunday						
12	Holiday						
13	3,100	28¾	29⅛	28⅝	28¾	28½	29
14	1,100	28¾	29	28¾	29	28¾	29
15	600	29	29	28⅞	28⅞	28¾	29
16	600	28½	28½	28	28⅛	28	28⅜
17	300	28⅜	28⅜	28⅜	28⅜	28⅜	28½
18	Sunday						
19	2,500	28⅛	28⅜	27⅛	27⅛	27¾	28
20	1,600	27⅝	27⅛	27	27⅜	27⅛	27¾
21	700	27⅜	27⅜	27	27	27	27⅞
22	1,100	26¾	27⅜	26¾	27⅜	27	27½
23	800	27½	27½	27	27½	27½	27¾
24	400	27½	27½	27⅜	27⅜	27⅛	27½
25	Sunday						
26	1,900	27½	27⅝	27⅛	27⅝	27½	28
27	1,400	27¾	28½	27¾	28¼	28⅛	28⅝
28	1,000	28⅛	29	28⅛	29	28⅞	29
29	Holiday						
30	1,700	29	29	28	28	28⅛	28½
	27,200		29¾	26⅝			

The value of the total number of shares sold from November 1 to November 30, 1934, inclusive, 27,200, based upon the mean of the high and low prices for the month ($28\frac{3}{16}$) was $766,700.

(b) *Weekly sales for the months of October, November, and December 1934*

Week ending—	Number of Shares Sold	High	Low
October 6, 1934	2, 200	29½	28½
October 13, 1934	2, 900	29¼	28⅝
October 20, 1934	4, 400	29⅞	27⅞
October 27, 1934	5, 800	28¼	27
November 3, 1934	2, 500	27¼	26⅝
November 10, 1934	7, 100	29¾	27⅜
November 17, 1934	5, 700	29⅛	28
November 24, 1934	7, 100	28⅜	26¾
December 1, 1934	6, 300	29	27⅛
December 8, 1934	16, 900	30⅞	28
December 15, 1934	4, 500	29½	28⅛
December 22, 1934	4, 800	28¼	27
December 29, 1934	7, 200	28¼	26½

(c) *Monthly sales for the months of November 1933 to October 1935, inclusive*

	Number of shares sold	High	Low
1933			
November	115, 000	39½	32¾
December	66, 200	38½	26½
1934			
January	68, 500	34⅞	27⅛
February	102, 900	34⅞	27
March	40, 200	29⅝	25⅞
April	54, 100	30⅞	27¾
May	58, 700	30½	25
June	101, 300	34⅞	28½
July	78, 000	35¼	28¼
August	49, 400	34½	29¾
September	21, 800	31	26½
October	16, 300	29⅞	26¾
November	26, 900	29¾	26⅝
December	35, 300	30⅞	26½
1935			
January	28, 600	29⅝	26⅝
February	44, 700	31¾	27
March	30, 200	31⅞	28¼
April	44, 600	30⅜	27⅛

(c) *Monthly sales for the months of November 1933 to October 1935, inclusive*—Continued

	Number of shares sold	High	Low
1935			
May	66, 900	32⅜	29½
June	20, 900	30⅞	28⅞
July	19, 900	30	27¾
August	21, 500	31	28½
September	19, 600	30½	28⅜
October	36, 100	30⅜	27½

The total value of the number of shares of Great Western sold from January 1 to December 31, 1934, inclusive, 653,400, computed on the basis of the mean of the high and low prices for the year (30⅛) was $19,683,675.

12. South Porto Rico, a New Jersey corporation organized in 1900, is a leading producer of raw sugar in Puerto Rico and Santo Domingo. Operating through its wholly owned subsidiaries, it has 150,000 acres of cane land and two sugar mills. Something less than 45 percent of its output comes from Puerto Rico, a territory of the United States, and the balance from Santo Domingo. In the crop year of 1933–1934, South Porto Rico accounted for 13.7 percent of the Puerto Rican production of raw sugar and 45.3 percent of the Santo Domingo production. Raw sugar is sold for further refining before consumption. Puerto Rican raw sugar is shipped to and sold in the United States duty free. The Santo Domingo production, because of tariff barriers in the United States, is sold in the world market. The world price, reflecting a free market, is substantially below the United States price, reflecting a protected market. In the month of November 1934, raw sugar was selling in the United States at from 3.08 cents to 2.80 cents a pound, while the average world market price for that commodity was ninety-two hundredths of a cent.

13. In 1934 South Porto Rico had outstanding 50,000 shares of 8 percent cumulative preferred stock, $100 par, and 745,735 shares of no-par value common stock. For the five-year period 1930 to 1934, inclusive, the average net income was $1,801,000 and the average earnings per common share were $1.88. Average dividends paid on common shares were

$1.33 and average book value was $36.39 on common shares. For the fiscal year 1934, earnings, dividends, and book value on common shares were $1.95, $2.40, and $31.81, respectively. Surplus and current assets were reduced by $4,475,000 in October 1933, by certain transfers of securities.

14. South Porto Rico common stock was listed and traded in on the New York Stock Exchange. It had a 1932 depression low of $4.50 a share but had risen sharply thereafter. Actual sales of South Porto Rico common on the New York Stock Exchange for the periods indicated were as follows:

(a) *Daily sales for the month of November 1934*

Day of month	Number of shares sold	Open	High	Low	Close	Bid	Asked
Nov. 1	1,000	23¾	24	23¾	23¾	23¾	24
2	600	23⅞	24¾	23⅞	24¼	24¼	24½
3	200	24¼	24⅝	24¼	24⅝	24¼	24¾
4	Sunday						
5	400	24¾	24¾	24½	24¾	24½	24⅞
6	Election Day						
7	800	24½	24¾	24⅜	24½	24½	24⅞
8	1,300	24⅝	25¾	24⅝	25⅜	24⅝	25½
9	200	25¾	25¾	25	25	24⅝	26
10	800	25¼	26⅛	25¼	26⅛	25½	26⅜
11	Sunday						
12	Holiday						
13	900	27	27	26¾	26¾	26½	27
14	400	26½	26½	26¼	26½	26	26½
15	1,000	26¼	26¼	25½	25½	25⅛	25½
16	2,500	25¼	25¼	23¼	24¼	24	25
17	No sales						
18	Sunday						
19	900	24¼	24⅞	24¼	24½	24	24½
20	700	24¾	24⅞	24½	24½	24¼	24½
21	800	24½	24⅝	24½	24½	24½	24¾
22	800	24½	24¾	24½	24¾	24½	24¾
23	700	24¾	24¾	24⅝	24⅝	24½	24⅝
24	400	24⅝	24⅝	24½	24½	24½	24⅝
25	Sunday						
26	1,100	24½	24¾	24¼	24½	24	24½
27	1,400	24⅝	24¾	24⅛	24⅛	24	24½
28	600	24⅛	24⅜	24	24¼	24	24½
29	Holiday						
30	700	24¼	24¼	23½	23⅝	23½	24
	18,200		27	23¼			

The value of the total number of shares sold from November 1 to November 30, 1934, inclusive, 18,200, based upon the mean of the high and low prices for the month (25⅛) was $457,275.

(b) *Weekly sales for the months of October, November, and December 1934*

Week ending—	Number of shares sold	High	Low
October 6, 1934	1,500	31¼	30½
October 13, 1934	3,100	30¾	28¾
October 20, 1934	2,300	29⅞	29
October 27, 1934	9,500	29½	23⅜
November 3, 1934	3,300	24⅝	23½
November 10, 1934	3,500	26⅛	24⅜
November 17, 1934	4,800	27	23¼
November 24, 1934	4,300	24⅞	24¼
December 1, 1934	4,800	24¾	22½
December 8, 1934	15,700	23⅞	21
December 15, 1934	5,200	23½	22½
December 22, 1934	7,800	22⅝	20⅝
December 29, 1934	8,900	22½	20

(c) *Monthly sales for the months of November 1933 to October 1935, inclusive*

	Number of shares sold	High	Low
1933			
November	35,000	43½	34
December	29,800	40½	32½
1934			
January	19,900	37½	32⅝
February	20,300	39⅜	33⅛
March	8,400	34¼	31⅜
April	16,100	35⅞	32
May	13,800	32¼	29⅛
June	23,300	36¾	29¾
July	27,200	37⅜	31½
August	11,300	36½	31
September	6,600	32⅝	30
October	17,800	31¼	23⅜
November	19,600	27	23¼
December	39,900	23⅞	20
1935			
January	14,200	23⅛	20
February	45,000	25	20
March	20,100	24½	21
April	26,500	26	22⅜
May	31,700	28⅜	24¾
June	10,700	26⅛	23¼
July	11,800	25½	23
August	19,700	24¾	22⅝
September	13,200	25⅝	23
October	24,700	25⅞	23⅛

The value of the total number of shares sold from January 1 to December 31, 1934, inclusive, 224,200, based upon the mean of the high and low prices for the year ($29^{11}/_{16}$) was $6,655,937.50.

15. Sugar securities, whether stocks or bonds, do not fall into the top investment class. They sell now and sold in 1934 at prices designed to yield a rate of return higher than the public demands for well-stabilized securities. This is the result of public appraisal of certain speculative factors inherent in the business which have nothing to do with the capabilities of management. Among these risks are governmental regulations by means of tariffs and quotas, which can never be regarded as finally stabilized, political considerations operating for or against the importation of foreign sugar from favored areas such as Cuba and the Philippine Islands, weather conditions influencing the supply of raw material, and the rather unsatisfactory financial record of certain sugar companies.

16. Throughout 1934 and for some years prior to that time, sugar producers suffered from an oversupply of sugar in the world markets and a resulting steady decline in world sugar prices. The United States protective tariff on sugar kept most of the foreign-grown product out of the domestic market, except sugar from Hawaii, Puerto Rico, and the Philippines, which were possessions of the United States, and from Cuba, which had a preferential tariff sufficiently low to permit it to compete vigorously in the United States. However, during 1934, domestic refined sugar prices, as well as domestic and world raw sugar prices, showed a general decline. In 1934 Congress passed the Jones-Costigan Act, effective June 8, 1934, which sought to remedy the evils flowing from overproduction of sugar by authorizing the Secretary of Agriculture to fix production quotas for domestic and territorial producers. Quotas fixed for 1934 by the Secretary of Agriculture, following the passage of this Act, materially reduced the amount which Great Western and South Porto Rico might produce and sell in the domestic market. As of November 19, 1934, there was uncertainty regarding the 1935 production quotas not then announced. At that time

informed opinion in financial circles considered the outlook for future earnings of these corporations to be unfavorable.

17. As shown by findings 11 and 14, by November 1933 stock-market prices for Great Western and South Porto Rico common stocks had staged a good recovery from depression lows and there was brisk trading in the shares of both corporations. During November 1933 sales of Great Western on the New York Stock Exchange were 115,000 shares at prices between 39½ and 32¾. Prices and volume of trading declined thereafter and during November 1934 the volume of trading was 26,900 shares at prices from 29¾ to 26⅝. In November 1933, 35,000 shares of South Porto Rico common were sold at prices ranging from a high of 43½ to a low of 34, whereas in November 1934 the volume was 19,600 shares at prices ranging from 27 to 23¼. During the same period, November 1933 to November 1934, the better grade industrial stocks did better than hold their position in the market. The proportion of the volume of trading in Great Western and South Porto Rico common stocks to their respective total outstanding shares compared favorably with the corresponding proportion of volume of trading in the Dow-Jones Industrials, and with the ten most active stocks on the New York Stock Exchange on November 19, 1934, both on that date and for the year 1934.

18. The markets for Great Western and South Porto Rico stocks on or about November 19, 1934, were reasonably good from the standpoint of volume of trading, free from misrepresentation or manipulation, and were free open markets where prices were determined by supply and demand. The prevailing prices of these stocks on the New York Stock Exchange on November 19, 1934, were fair prices for the volume of stock being traded on the market at that time. In general the buying public which was dealing in these stocks was fully informed as to all factors affecting their values and gave full effect thereto in the market prices prevailing on November 19, 1934.

19. The donees of the separate gifts which plaintiff made on November 19, 1934, in the total amount of 160,000 shares of Great Western stock and 20,000 shares of South Porto Rico stock, did not sell these shares or any part thereof at or about

that time or anywhere near that time. There is no evidence in the record that they ever offered all or any part of such stock for sale at any time, or that blocks of such stock of comparable size were offered for sale at one time at or about November 19, 1934.

20. On November 19, 1934, an additional 160,000 shares of Great Western common stock or 20,000 shares of South Porto Rico common stock could not have been sold on the New York Stock Exchange without depressing the price. The size of a block of corporate shares becomes an important element in determining the amount that can be realized from the sale of those shares on a given date when the block is larger than the current market can absorb without price dislocation. On occasion the amount which can be realized from the individual shares making up the block may be enhanced if the block carries with it control of the corporation and a purchaser anxious to secure that control can be found. The element of control stock did not prevail with respect to the stock involved in this case since the 160,000 shares of Great Western was equal to only 8.89 percent of a total of 1,800,000 shares outstanding, and the 20,000 shares of South Porto Rico was equal to only 2.68 percent of a total of 745,735 shares outstanding.

21. The method of marketing these blocks of Great Western and South Porto Rico stocks which would have yielded the greatest return to a seller on November 19, 1934, would have been a sale to a group of investment bankers forming an underwriting syndicate for the purchase of the shares with the intention of reselling them to the public. In the case of the Great Western stock two or three bankers would probably have constituted the original purchasing group who would associate with them a secondary group of ten or twelve to spread the risk. A third or selling group of several times that number would have been assembled. The syndicate would plan to offer the stock to the public through the facilities of its selling group at a price fractionally under the market in order to stimulate sales. For the Great Western stock on November 19, 1934, the offering price to the public would have been in the neighborhood of 27½ as against a low for the day on the Exchange of 27⅞.

For their services and expenses the underwriters and their associates would require a spread or compensation of about 2½ to 3 points a share which would be deducted from the public offering price in figuring the amount which the underwriters would pay for the stock. Under a sale in that manner, a seller of 160,000 shares of Great Western stock on November 19, 1934, could reasonably have expected to have received approximately $25 a share. A similar method of marketing the South Porto Rico stock would have been followed except that the smaller money risk involved would have permitted the elimination of the secondary group of underwriters and would thus have eliminated a portion of the underwriting spread. That transaction could have been handled on a 2-point spread with the public offering of the shares at 24 (against a market low for the day of 24¼) and the consequent payment to the seller by the underwriters of $22 a share.

Investment trusts, insurance companies, and financial institutions, which carry large blocks of listed stocks in their portfolios, ordinarily report to their stockholders and in their balance sheets the market value of such stocks on any given date at amounts obtained by multiplying the number of shares owned by the prevailing market price on the exchanges on that date, regardless of the number of shares held. In some instances a further report is given by such companies to their stockholders of the estimated realizable value upon forced liquidation, which shows a discount from the market values just referred to on account of brokerage, transfer taxes, and blockage.

22. The actual fair market value on November 19, 1934, of the 160,000 shares of stock of Great Western was $25 a share, or $4,000,000; and the actual fair market value of the 20,000 shares of stock of South Porto Rico on November 19, 1934, was $22 a share, or $490,000.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The two principal questions presented are whether, for the purpose of the gift tax, a taxpayer may submit evidence

to prove that the actual fair market value of a large block of stock of a corporation made the subject of a gift on a certain date is less on the date of the gift than the mean between the highest and lowest selling prices of a comparatively small number of shares of such stock on the Stock Exchange on such date; and, if so, the fair market value of the shares of such large block of stock under all the circumstances and conditions affecting or having a material bearing upon such market value or price at which such stock could have been disposed of on the date of the gift to the best advantage.

A third question is whether, for the purpose of obtaining a refund of an overpayment of a gift tax paid in 1935 in respect of a gift made in 1934, a claim for refund therefor must be filed within three years from the date in 1935 on which such tax was paid; or whether the gift tax is such a continuing tax upon the individual, irrespective of when the gifts were made, that the taxpayer may claim and obtain a refund to which he may be entitled in respect of the tax paid in 1935 on the gift in 1934 out of a gift-tax payment in 1938 on other gifts made in 1937, on a refund claim filed within three years of the 1938 payment, but more than three years after the 1935 payment, in respect of which the claimed overpayment is asserted.

This suit was brought to recover an alleged overpayment in 1935 of $244,324.01, with interest, in respect of a gift of stock made by plaintiff in November 1934.

Plaintiff made a gift to and in trust for his four children, among other properties or securities, of 160,000 shares of the common stock of the Great Western Sugar Company and 20,000 shares of the common stock of the South Porto Rico Sugar Company. In making a gift-tax return in 1935 of gifts made during the calendar year 1934 and in computing the gift tax thereon, plaintiff, on this return, valued each share of Great Western stock at $28.125, or $4,500,000 for the whole of the 160,000 shares, and each share of South Porto Rico stock at $24.50, or $490,000 for the whole number of 20,000 shares. These values used on the return represented the mean between the highest and lowest quoted selling prices a share of such of the stock of these two corporations as was

sold on the New York Stock Exchange on November 19, 1934, the date of the gift. Upon this return of gifts made in 1934, which included gifts other than the stocks mentioned, plaintiff paid on March 14, 1935 a total gift tax of $2,373,878.82. The Treasury made certain adjustments which were not related to the reported values of the stocks here involved and determined a deficiency of $23,433.53 in tax and interest thereon of $3,252.12, totaling $26,685.65. This additional tax and interest was paid July 13, 1934. Claims for refund were filed in 1939 and were rejected in 1940, as set forth in findings 6 to 9, inclusive.

The facts as established by the evidence submitted by plaintiff with reference to the business, earnings, and stock of the Great Western Sugar Company and the South Porto Rico Sugar Company, the daily sales of such stock on the New York Stock Exchange during November 1934, the weekly and monthly sales during other periods, the conditions and circumstances which would have affected the fair market values of the large blocks of stock here involved had these blocks of stock been offered for sale or been sold on the Stock Exchange on the date of the gift, the manner or method by which these large blocks of stock could have been sold or disposed of at one time to the best advantage and at the best prices, and the actual fair market values or prices a share of such blocks of the 160,000 and 20,000 shares, respectively, on the date of the gift, are set forth in findings 10 to 22, inclusive. The largest number of sales of stock of the Great Western Sugar Company on any day during November 1934 was a total of 3,800 shares on November 8, and the total number of shares of this company's stock sold on November 19, the date of the gifts here involved, was 2,500 shares. The total of the daily sales of this stock during the entire month of November 1934 was 27,200 (finding 11).

Likewise, the largest number of sales of the stock of South Porto Rico Sugar Company on any day during November 1934 was a total of 2,500 shares on November 16, and the total number of shares of this Company's stock sold on November 19 was 900 shares. The total of the daily sales of this stock during the entire month of November 1934 was 18,200 (finding 14).

The facts as set forth in findings 20 and 21 were found by the Commissioner of this Court from all the evidence submitted. The evidence from which those findings are made, and which fully establishes the facts therein set forth, is uncontradicted by any evidence submitted by defendant. The defendant, however, objected at the trial to the introduction by plaintiff of any evidence to establish the facts relied upon by plaintiff, and set forth in said findings 20 and 21, on the ground that such evidence was incompetent and immaterial because the mean between the highest and the lowest selling price of the stock of these two corporations on the New York Stock Exchange on November 19, 1934, the date of gift, established the fair market value a share of the stock of these corporations and should be found and used as the values for the purpose of measuring the gift tax upon the transfer by gift of 160,000 shares of the Great Western Sugar Company and 20,000 shares of the South Porto Rico Sugar Company on November 19. Defendant also takes exception to the report of the Commissioner as to facts found by him and set forth in findings 20 and 21, and to a finding of values as set forth in finding 22 on the ground that these findings "set forth ultimate conclusions of facts which are deemed both improper and unwarranted in that they were based upon assumed facts that were both speculative and contingent and also for the reason that the summary conclusions [of ultimate facts] cannot fairly be said to relate to any issue in this proceeding."

We think defendant's objection to the testimony offered by plaintiff to establish such facts as are set forth in the questioned finding was properly overruled by the Commissioner and that defendant's exception to the findings made by the Commissioner is not well taken. Defendant's objection to the testimony and the findings established thereby is not consistent with the well-established rule of law for determination of fair market value and is not consistent with Treasury Regulations (art. 19 (3), Regs. 79, 1932 ed.) in effect from the inception of the gift tax to 1936, or with Regs. 108 (sec. 86.19, 1939 ed.). Defendant's position on its exception in effect attempts to apply the rule which, for a time, the Treasury Department attempted to enforce, as

written into art. 19 (1), (3), of Regs. 79, 1936 ed., that listed stocks should be valued at "the mean between the highest and lowest selling prices" on the Stock Exchange "upon the date of the gift." Each share of stock is to be valued separately and the size of the gift of any security is not a relevant factor and will not be considered in such determination of value." However, the rule attempted to be applied under this regulation was rejected by the courts, and the regulation was revoked and modified by a new regulation, first contained in T. D. 4901 (1 Cum. Bul. 1939, pp. 341, 342), as follows: "In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value."

This change was carried forward and has been continued, unmodified, in sec. 86.19, Regs. 108, *supra*, in which it is provided that "Where such method [values at the mean between the high and low selling prices on the Stock Exchange] does not reflect the fair market value of the gift, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value."

Sec. 506, Revenue Act of 1932, provides that "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." Regs. 79, Art. 19 (1), provides that "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. All relevant facts and elements of value as of the time of the gift should be considered." And the regulations made pursuant to law from the inception of the gift tax have consistently provided, with the exception above-mentioned, as follows: "The value of stocks and bonds listed upon a stock exchange shall be obtained by taking the mean between the highest and lowest quoted selling prices upon the date of the gift, except where such selling prices do not reflect the fair market value of the gift."

The courts that have dealt with the matter of determining fair market value of a large block of stock for estate and gift tax purposes have held, and we agree with such holdings, that it is competent and material for a taxpayer to introduce evidence through witnesses who are familiar with and are in a position to know what conditions and circumstances have an effect upon the market value of stock or property to show, if it be a fact in the particular case, that as a result or because of such conditions and circumstances the fair market value or the realizable market value of a certain amount of stock or securities on the date of gift is less than the price at which a comparatively small amount of such stock or securities sold on the Stock Exchange on the date of the gift. The fact that a gift involves a large number of shares of stock or securities does not, standing alone, create any presumption as to value, but the size of the gift and the extent to which it may under proven conditions and circumstances affect the fair market value of the gift is a factor to be considered along with such other elements or factors affecting market value as may be shown by the evidence. *Helvering* v. *Safe Deposit and Trust Company of Baltimore*, 35 B. T. A. 259, 263, affirmed 95 Fed. (2d) 806.

Where a stock is listed on a Stock Exchange and is bought and sold from day to day at certain prices and in numbers of shares which are small, as compared to the number of shares of the same stock made the subject of a gift, a holding that competent evidence may not be submitted for the purpose of showing the fair realizable market value of a large block of such stock on a certain day may be less, as applied to each share, than such exchange prices would not accord with the provision of the statute that where a gift is made in property the value of the property at the date of the gift shall be considered the amount of the gift, nor with the regulation made pursuant to the statute which, with the exception hereinbefore mentioned, has been in effect since the gift tax was first imposed. As was said by the court in *Groff* v. *Smith*, 34 Fed. Supp. 319, 322, 323: "The Government objects that sales prices are the best evidence of market value. With this generality I agree. But I don't agree that the sales price of one acre of land or of 200 shares of stock is necessarily the

best evidence of market value of a thousand acre tract or of a block of 14,000 shares. *Hazeltine Corp.* v. *Commissioner*, 3 Cir., 89 F. 2d 513. The existence of a market for the smaller item is at most slight evidence of the contemporaneous existence of a larger market. One must consider the capacity of the market to absorb the large offering if there is competent evidence on that factor. A substantial disparity between the volume of sales upon which the Commissioner's finding is based and the size of the block to be valued, opens the door to competent evidence that the entire block could not have been sold at the sales prices obtaining at the critical date."

In the ascertainment of value "there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Standard Oil Company of New Jersey* v. *Southern Pacific Corporation, et al.*, 268 U. S. 146, 156.

The testimony and exhibits introduced by plaintiff give a complete background of the industrial and financial history and prospects of both Great Western and South Porto Rico. The testimony covered fully the subjects of capitalization, earnings, investment, book value of shares, and dividend policy. It presented all relevant stock market transactions for a year prior and a year subsequent to the basic date and interpreted these transactions. The testimony presented the good and bad points, from the standpoint of an investor, of sugar companies in general and these companies in particular, stressing tariff problems and political consideration, quotas which curtailed production and speculative factors inherent in the business. The state of the stock market near November 19, 1934, was examined and the progress of Great Western and South Porto Rico stocks contrasted with other sugar stocks and with other industrials. The ability of the stock market to absorb additional shares of these two stocks was investigated and set forth in the record, as well as the possibilities of outside financing. Flotations of comparable lots of securities were referred to, with details of prices to the owner and to the public and the reasons for the spread between the two. There was definite and convincing testimony on the subject of the highest price which a willing seller might

expect to receive for these shares from a willing buyer on November 19, 1934.

Both Great Western and South Porto Rico were well organized and operated sugar companies with good production and fair earnings records. Their stocks sold in substantial quantities on the New York Stock Exchange but both price and volume had been declining for a year prior to November 19, 1934, although the general market trend was upward.

On that date Great Western common was selling around \$28 a share, or approximately 31½ times its five-year average annual earnings of 89 cents. South Porto Rico was selling about \$24.50 a share, or approximately thirteen times its five-year average annual earnings of \$1.88. At that time informed opinion in financial circles considered the outlook for future earnings of these corporations to be unfavorable.

In 1934 the stock market machinery for handling sales of large blocks of stock was not as well developed as it is today. Any attempt to dispose of these blocks of Great Western and South Porto Rico would have depressed the market over the long term necessary to sell the shares. There was no particular demand for either of these stocks in excess of the amounts being currently traded in. The 160,000 shares of Great Western represent 6,400% of the 2,500 shares actually traded on November 19, 1934, 3,700% of the 7,100 shares sold during that week, and 816% of the 26,900 shares sold during November 1934. The 20,000 shares of South Porto Rico are 2,222% of the 900 shares actually sold on November 19, 1934, 465% of the sales of 4,300 shares for the week, and 102% of the sales of 19,600 shares for the month of November.

The evidence shows that the quantities involved were too large for the stock market to absorb on one day. The greatest returns to a seller on November 19, 1934, would have been from a sale to an underwriting syndicate for resale to the public. Without going into the details of the underwriting, which is covered in the findings, the proof shows that a seller of these shares of Great Western could reasonably have expected to receive not more than \$25 a share, and for South Porto Rico not more than \$22 a share.

The proof shows that on the universally accepted test of a willing buyer and a willing seller, the fair market value on November 19, 1934, of the Great Western stock was not in excess of $25 a share, and for South Porto Rico not in excess of $22 a share. The evidence shows that these values are based upon the theory of the greatest return to the seller. It cannot, therefore, be said that some other method, as to which there is no evidence, would have yielded a greater return.

In *Helvering* v. *Safe Deposit and Trust Company of Baltimore*, *supra*, the court had before it for review a decision of the Tax Court fixing fair market values for estate-tax purposes for 35,000 shares of one stock and 134,000 shares of another. The values which had been determined by the lower court were below the Stock Exchange prices for November 30, 1931, the date of death, and the only question before the court was whether, as a matter of law, the Tax Court rightly took into consideration the proven effect of the amount or number of shares of stock to be valued. The court, at page 812, said:

"In our opinion, the Board was right in basing its conclusions upon the realities as it found them rather than upon considerations of abstract logic. It could not ignore the pregnant fact, having found it to exist, that a large block of stock cannot be marketed and turned into money as readily as a few shares. The opposite condition might possibly have prevailed, for the influence of the ownership of a large number of shares upon corporate control might give them a value in excess of prevailing market quotations, in which event the application of the administrative rule would be unfair to the government. It would have been improper of course to have adopted as the true value of the stock the price obtainable by forcing or dumping the whole block on the market at one time; and likewise improper to have based the finding on the value as of an earlier or later date. But the Board did none of these things. It took into consideration the difficulty inherent in disposing of so large a quantity of stock, the market price for a few hundred shares on the day of death, and the downward trend of the market as indicated by sales before and after death, and it made an

estimate of market value of the whole, as required by the statute. In so doing it was obliged to use its best judgment rather than a cut and dried formula; but this was only the employment of a familiar process which on numerous occasions has been defended by the Commissioner and approved by the courts."

Following the decision in the *Safe Deposit and Trust Company* case, *supra*, by the Court of Appeals for the Fourth Circuit, the Circuit Court of Appeals for the Seventh Circuit decided the case of *Commissioner* v. *Shattuck*, 97 Fed. (2d) 790, and held that Treasury Regs. 79, art. 19 (3) (1936), which provided that in determining the value of a gift for the purpose of the excise tax the size of the gift of any security was not a relevant factor to be taken into consideration, was invalid. The court further said:

"To hold that the value of a large block of corporate stock, for which there is no market, must be determined at the same value per share as that for which a few shares were sold, for which there was a market, without taking into consideration other factors and circumstances which plainly affects the value is supported by neither logic nor reason. It is a matter of common knowledge that the value of any product or commodity, whether it be wheat, hogs, or otherwise, is affected by the law of supply and demand, and that where the former far exceeds the latter, it has a depressing effect upon value. Reference to the daily markets of the country support this statement. No doubt the value of corporate stock is similarly affected.

"We agree with the statement of the Board of Tax Appeals (decision unreported):

"'This evidence further shows to our satisfaction that the 30,000 shares disposed of by each petitioner by gift could not possibly have been sold through the Stock Exchange, or otherwise, at the mean of the prices realized on the comparatively small quantity actually sold or the mean of the bid and asked prices on the date the gifts were made. Petitioners have presented the uncontradicted testimony of qualified witnesses familiar with the problem of disposing of stock of this character in blocks of this size, from which it is quite evident that such disposal could not have been effected

except at so-called wholesale prices, by an arrangement for the underwriting of the disposal of the sale of stock which would have entailed an expense netting a price below that possible to have been secured for small blocks of stock through market sales at retail.' "

The case of *Helvering* v. *Maytag*, 125 Fed. (2d) 55, involved the determination of the fair market value on January 18, 1934, for estate-tax purposes, of 133,859 shares of common stock and the fair market value on December 18, 1934, for gift-tax purposes, of 400,000 shares of the same stock. The stock was listed and traded in continuously on the New York Stock Exchange, but not in numbers of shares comparable to the blocks to be valued. The Government contended before the Tax Court and the Circuit Court of Appeals that the exchange prices should govern and that the total number of shares involved should be valued for each share on the basis of the mean between the highest and lowest selling prices on the Stock Exchange. The Tax Court after considering all the evidence reached the decision that the fair market values of the stock on the applicable dates were substantially less than the Stock Exchange prices. The Circuit Court of Appeals affirmed, and said, p. 63:

"On the other hand, while we are cited to no direct ruling of the Supreme Court or this court upon the precise contentions here presented for the Commissioner, they have been frequently considered by other federal courts and the decisions are unanimously against him. As well as any controverted question of administrative law may be settled without declaration by the Supreme Court, it is established that the size of a block of listed stock may be a factor to be considered in its valuation for gift or estate tax purposes. Where, as in this case, the taxpayer affirmatively shows that a block of listed stock to be valued is very great in comparison with the amounts of the stock which have been traded in on the exchange where it is listed, that the block of stock could not be sold on such market at its quoted prices within a reasonable time by skilled brokers following prudent practices for liquidation and that the true value of the block of stock is in fact different from the price quotations, then the taxpayer is en-

titled to have all other proper evidence of the value of the block of stock considered together with the market quotations. The arguments for the Commissioner to the contrary have not persuaded us that the rulings of other Circuit Courts of Appeals and District Courts to the stated effect should be departed from."

The Government's petition for writ of certiorari to review the above decision was denied (316 U. S. 689).

In the recent case of *Henry F. du Pont* v. *Commissioner of Internal Revenue*, 2 T. C. 246, the court had before it the matter of determining the fair market value on January 4, 1939, for gift-tax purposes, of 52,900 shares of the du Pont Company's common stock; on the date in question 1,400 shares were sold on the New York Stock Exchange at from $152 to $154.25. The Treasury had valued the 52,900 shares at the mean between these two prices, or at $153.125. During the month of January 1939, 41,400 shares of the du Pont stock had been sold on the market at from $156.75 to $142. Trading in this stock was at all times active and substantial. After considering all the evidence submitted, the Tax Court determined the value of the 52,900 shares at $135 a share. The court said:

"We have fixed the value of the corpus of the trust fund at a price per share of $135. This is some 18 points below the per share price at which the stock was selling on the New York Stock Exchange on the date of the gift. In the light of the evidence, however, we are satisfied that the actual sales figures are not to be taken as an accurate reflection of value by reason of the size of the block involved in the gift which consisted of upwards of 50,000 shares of the same stock. * * *.

"There was uncontradicted testimony from petitioner's witnesses that in their opinion the sale of a block of that size on or about the date in question at stock market prices would have been impossible. If such a view was excessively pessimistic, the respondent had ample opportunity to produce contrary evidence, but this was not done. He contended strenuously at the hearing, and continued to do so in his brief, that petitioner's testimony was inadmissible and should be

disregarded. But the respondent's regulations on the subject take notice of the present situation and permit 'some reasonable modification' where 'it is established that the value per bond or share of any security determined on the basis of a selling or bid and asked prices as herein provided does not reflect the fair market value thereof.' Regulations 79, art. 19 (3), as amended by T. D. 4901. It would be in the highest degree anomalous, and this portion of the regulation would be deprived of all meaning, if a taxpayer were prevented from establishing by testimony the very fact which the regulation requires as the premise for the 'reasonable modification' of market prices which the same provision permits. There may be better ways to submit such proof, although they are not readily apparent, but we cannot for that reason refuse to consider the opinions of qualified witnesses in the absence of better evidence and in fact of any at all."

Upon the facts established by the evidence submitted in the case at bar, we are of opinion that the fair market values of the 160,000 shares of Great Western and 20,000 shares of South Porto Rico stocks were $25 and $22 a share, respectively. It therefore follows that plaintiff overpaid the gift tax on gifts made during the calendar year 1934.

It appears, however, from the facts (findings 5 to 8, inclusive) that the claim for refund filed by plaintiff in 1939 was filed more than three years after payment of the tax on the gifts made in 1934, except as to the portion of such tax paid on July 13, 1937, of $23,433.53 plus interest of $3,252.12, totaling $26,685.65 (finding 3).

Plaintiff contends, however, that under the provisions of secs. 501 (a) and 502 of the Revenue Act of 1932, which provided for a computation of the gift tax at the graduated rates on all gifts made after the enactment of that act, Congress departed from the annual method of imposing the tax and based the computation of the gift tax to be paid not only upon gifts made within a single year, but also upon gifts made in all preceding years, subsequent to 1931, and that, by reason of this method of imposing and computing the gift tax, a taxpayer is entitled under a claim for refund filed within three years after payment of the gift tax for any year

to recoup out of such payment, any overpayment which may have been made in a prior year, even though the tax for such year of recoupment is not overpaid.

We think this contention is without merit under the clear provisions of the statute. It seems clear enough from the provisions above referred to with reference to the method and manner of computing the gift tax on gifts made in the calendar year 1932 and subsequent years, as explained in the Reports of the Congressional Committee (House Report 708, 72d Cong., 1st sess., pp. 462, 477), and Treasury Regs. 79, art. 5, 1932 ed., when considered in connection with the provisions of sec. 528 of the Revenue Act of 1932 relating to refunds and credits of gift taxes, that Congress intended any refund of a gift tax paid upon a gift made in a certain year should be barred unless a claim for refund thereof is filed within three years from the time such tax was paid. Sec. 528 provides that where there has been an overpayment of a gift tax the amount thereof shall be credited against any gift tax then due from the taxpayer and any balance shall be refunded, and under subsections (b), (1) and (2), entitled "Limitation on Allowance," it further provides as follows:

"(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after three years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

"(2) *Limit on Amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund * * *"

The report of the Ways and Means Committee on the Revenue Act of 1932, as well as the report of the Finance Committee of the Senate (Senate Report No. 665, 72d Cong., 1st sess., p. 525), after setting forth that the theory upon which the gift tax was based in that act was that the rate of tax should be measured by all gifts made after the enactment of that act, and that this scheme was adopted in order

to tax gifts made over a period of years at the same rate as if they had all been made within one year, stated that "For a more effective administration and to secure prompt collection of the revenues, the bill provides that the tax shall be computed and collected annually."

In view of the above, it follows that such portion of the overpayment of tax on the gifts made in 1934 as was included in the tax paid on March 14, 1935, when the gift-tax return for 1934 was made, is barred by the statute of limitation imposed by sec. 528, *supra*, and plaintiff's recovery in respect of such overpayment must be limited to the amount of $26,685.65 with interest, as provided by law. Judgment for that amount will therefore be entered. It is so ordered.

WHITAKER, *Judge*, and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

I think the evidence introduced by the plaintiff, upon the basis of which the court has decided the case, has no tendency to prove that the stock exchange prices on the day of the gift were not the actual values of the stock given. The Revenue Act of 1932 provided:

> SEC. 506. If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

Treasury Regulations 79 (1933 Ed.) gave, in Article 19, the conventional definition of value. It said "The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell." This meaning of value is used for all sorts of legal purposes, such as direct property taxes, excise taxes computed on value, condemnation and requisition for public use, measuring damages for destruction or conversion and other purposes. When the local tax assessor values the livestock in his taxing district, he uses this definition of value, but he does not assess A's 100 cows at $90 a head, and B's 1 cow at $100 a head

because, although cows of the kind they both have are selling currently at $100 a head, the available market would be depressed if A's 100 cows were all offered for sale on the assessment day. He knows that A is not selling his cows, and is not willing to sell them for even $100 a head, to say nothing of $90. They are not being sold, *en bloc;* they are being taxed. And if A should, on the tax day, make a gift to his son of his 100 cows, it would be remarkable if the gift tax gatherer, in applying the same meaning of value to the same cows, should be obliged to value them at $90 a head.

The fallacy in the plaintiff's contention is well stated by Judge Murdock of the Tax Court in his dissenting opinion which was concurred in by five other judges, in *Avery* v. *Commissioner*, 3 T. C. 963, 971. He says that the evidence of the taxpayer in that case, which was like that of the plaintiff in this case, did not tend to show what a willing seller would have sold the stock for, but what an unwilling seller, forced to market an unusually large block of the stock on a single day, would have had to take for it. Neither in that case nor this is there any evidence whatever as to what a willing buyer, desirous of acquiring so large a block of stock on a certain day, would have had to pay for it. Certainly he could not have bought it from the plaintiff at a discount for quantity. We know that if a willing buyer had placed an order for such a block of stock on a certain day, the price would have gone up.

When, as here, we are not dealing with actual sales, but are attempting to determine hypothetically a market value, I can think of no reason why what a hypothetical seller of an extraordinary amount of a commodity on the tax day would have to take for it is a bit more relevant than what a buyer of an extraordinary amount of the same commodity on the tax day would have to pay for it. In short, I think that neither figure is of any assistance. If the commodity were one for which there is a normal wholesale market, so that one who desired a large amount of it could on that market buy it cheaper, in the regular course of business, and

one who had a large amount of it to sell could, because of the competition of other wholesalers, expect to get only the wholesale price, then evidence of that price would be evidence of value. But there was no wholesale market for the stock here in question, and no owner of it would, willingly, throw so much of it in one day upon a market in which only smaller amounts were being traded.

The plaintiff's evidence is based on the hypothetical assumption that the whole 160,000 shares of Great Western stock and the whole 20,000 shares of the South Porto Rico stock were to be marketed on the same day. But the gifts were to four individuals, and the majority of the Tax Court in the *Avery* case, *supra*, held that the hypothetical sale of the stock given to each donee should be treated separately, and in disregard of the others. The result was that the hypothetical market was not so seriously affected, and the prices were not discounted so much from the actual market prices, as they would have been under the other assumption. I see no particular reason for so splitting up the total of the gifts, if we are to engage in the assumption that sales were made which were not made, and in a kind of market which did not exist. I should think that if other donors happened on the same day to make large gifts of the same stock, it would be reasonable to urge that those gifts be included in the hypothetical offerings to the market. But I think it would be equally reasonable for the tax assessor, in determining the value of the livestock in his county on the statutory assessment day, to assume that all the livestock in the state were hypothetically for sale on that day, which, if he did assume it, would depress assessed values, though it would have nothing whatever to do with the actual market value of livestock.

I think the stock exchange prices which the plaintiff used in his original return, and which the Commissioner accepted, are the only relevant evidence of value which we have. I would, therefore, dismiss the petition.

JONES, *Judge*, took no part in the decision of this case.

MILTON A. HILL v. THE UNITED STATES

[No. 45995. Decided April 2, 1945]

On the Proofs

Pay and allowances; damages to Army officer's household goods before completion of shipment to new quarters.—Where plaintiff, an officer in the U. S. Army, proceeded under proper travel orders to his newly assigned post of duty in the Philippine Islands, and where, in accordance with Army regulations, his household goods were shipped by Army transport and duly unloaded at Manila and placed temporarily in the sorting room of the Quartermaster's receiving office, awaiting further transportation to plaintiff's new quarters; it is *held* that plaintiff, under the provisions of the Act of March 4, 1921 (41 Stat. 1436), is entitled to recover for damages to his property by flood waters while his household goods were in the receiving office.

Same; recovery under Act of March 4, 1921.—Where an officer's household goods are in transit pursuant to an officer's travel orders, any disbursement for damages would be under the Act of March 4, 1921, and not under the successive appropriation acts codified as Section 223, Title 31, U. S. Code. *Regnier* v. *United States*, 92 C. Cls. 437.

Same; meaning of "travel under orders" as used in statute.—Under the Act of March 4, 1921, which contains no reference to "transit" nor "storage," recovery is allowable when loss, damage or destruction occurs "during travel under orders," which relates to a movement, by private or common carrier, of an individual rather than to inanimate objects such as household goods. Orders are directed to an officer and not to his goods.

Same.—"Travel under orders," as used in the statute, has reference to that which was undertaken pursuant to the travel orders, and the period covered in relation to the household goods of an officer may extend beyond the period of the officer's own travel, since he may well conclude his own travel before his goods reach the destination specified in his travel orders.

Same; recovery limited to situations where officer is not at fault.—The statute (41 Stat. 1436) limits recovery to situations where the loss, damage or destruction has occurred without fault or negligence on the part of the officer.

Same; approval of claim under inapplicable statute is immaterial.—Approval of plaintiff's claim by the Secretary of War, under Section 223, Title 31, U. S. Code, which was not applicable, instead of under the Act of March 4, 1921, which is applicable, is immaterial, since the Secretary's decision as to the applicability of

such statute was a conclusion of law, not binding on the Court of Claims. *Builders Club* v. *United States*, 83 C. Cls. 556, and *Siegel et al.*, v. *United States*, 84 C. Cls. 551, cited.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Milton A. Hill, served as a cadet at the Officers' Training Camp, Puerto Rico, from August 28, 1917, to November 27, 1917, and as a commissioned officer in the United States Army from November 27, 1917, to January 22, 1919. On March 12, 1920, he accepted appointment as a first lieutenant, Infantry Section, Officers' Reserve Corps; on July 1, 1920, he was appointed as a first lieutenant in the Regular Army, which appointment he accepted on October 2, 1920. He has served continuously as a commissioned officer since October 2, 1920, attaining his present rank of lieutenant colonel in the Regular Army on February 4, 1941, and his present temporary rank of colonel in the Army of the United States on December 19, 1941.

2. Plaintiff claims reimbursement of the value of certain household goods belonging to him, which were damaged or destroyed on November 11, 1937, while alleged to be in transit, and in connection with plaintiff's travel from Fort Wayne, Michigan, to Fort William McKinley, Philippine Islands, under paragraph 26 of Special Orders No. 60, issued by the War Department on March 15, 1937, which orders relieved plaintiff from assignment and duty at Fort Wayne, Michigan, and transferred him to duty in the Philippine Department.

3. Upon learning of the destruction and damage to his household goods, plaintiff filed a claim, through official channels, for reimbursement of the value of damaged or destroyed property. His claim was investigated by a Board of Officers, convened at Fort William McKinley on December 9, 1937, under the provisions of Army Regulation

35–7100, which Board made findings with respect to the circumstances under which plaintiff's loss occurred; that the damage was not caused through the fault or negligence of the plaintiff; and recommended the allowance of his claim in the sum of $244.18. The claim was further examined by a Board of Officers convened on May 3, 1938, in the Office of the Chief of Finance, United States Army, which Board recommended disallowance of the claim on the theory that the evidence did not show that the plaintiff's property had been damaged or destroyed while in transit, but instead the evidence indicated that it had been damaged or destroyed while in storage. By letter of May 10, 1938, plaintiff's claim was submitted to the Assistant Secretary of War, with the recommendation that it be disallowed, which recommendation was approved by him on May 12, 1938.

4. By letter dated May 17, 1938, plaintiff was notified of the disallowance of his claim, and on September 14, 1938, he made written protest of the disallowance of his claim, submitting with his protest a certificate from a Captain H. W. Allen, who certified to facts which indicated that plaintiff's goods were still in transit at the time the loss or destruction occurred.

5. Plaintiff's claim was referred back to the Board of Officers at Fort William McKinley, Philippine Islands, which Board reconvened on April 15, 1940, and after further consideration of plaintiff's claim, found:

That plaintiff's household goods arrived at Pier #1, Post Manila, Philippine Islands, on the United States Army Transport *Grant*, on October 29, 1937; that they were unloaded and placed on "lorchas" during the period from October 29, 1937, to November 5, 1937; that they arrived at the Quartermaster Receiving and Shipping Office Dock, Fort William McKinley, Philippine Islands, on the afternoon of November 5, 1937; that there was no record showing the exact time the last piece of plaintiff's property was unloaded from the lorchas, but that it must have been by the afternoon of November 10, 1937; that the following day, November 11, 1937, was a legal holiday and no work was done at the Receiving Office; that on the afternoon of the

11th the Pasig River overflowed and the water was about 18 inches deep in the Quartermaster's Receiving Office; that plaintiff's property was in the sorting room of the Quartermaster Receiving Office less than 24 hours before being damaged by floodwater; and that his property was in transit at the time of the damage, not in storage.

The Board recommended that plaintiff's claim be allowed as follows:

Cleaning, laundry of uniforms, clothing, blankets, rugs and other household effects	$27.90
Repair and renovation of three mattresses	17.37
One overstuffed sofa and two chairs (destroyed)	150.00
One overstuffed chair	15.00
Three trunk lockers at $7.95 each	23.91
One raincoat damaged by QMC laundry	10.00
Total	244.18

and that the following items be disallowed:

One locker, steamer, worn out and unserviceable.
One cedar chest, one large mirror, for the reason that the articles were damaged while in transit and not by the flood.
One lady's Spanish shawl—not necessary to personal use, considered a luxury.
One pair of field glasses repaired by Ordnance.

6. Plaintiff's claim was further considered by a Board of Officers convened in the Office of the Chief of Finance on January 7, 1941, which Board recommended that the previous action of the War Department in disallowing the claim be not sustained, and that the claim be approved subject to decision by the Comptroller General of the United States.

The claim, in the amount of $244.18, was submitted to the Comptroller General and was disallowed by him on July 11, 1941, on the ground that the property had arrived at its destination and was delivered to the Quartermaster, Fort William McKinley, and placed in the quartermaster storage house there pending request by the plaintiff for delivery to his quarters and consequently was not in transit, which the Comptroller General held was a prerequisite to entitlement under the act of March 4, 1921 (41 Stat. 1436).

7. The Chief of Finance concurred in the recommendation of January 7, 1941, of the Board of Officers that plaintiff's

claim be allowed but, not concurring in the amount thereof, wrote, on August 29, 1941, a memorandum for the Under Secretary of War stating that:

> * * * the damage to claimant's household goods were caused by an unprecedented flood which could not have been reasonably foreseen nor guarded against, and that the damage was incident to the training, practices, operation, or maintenance of the Army. It is the further view of this office that, in addition to the items listed in Paragraph 6, the following items are properly for allowance:
>
> | | |
> |---|---|
> | One lady's Spanish shawl | \$35.00 |
> | Two large frames for oil paintings (Estimated cost to repair same) | 5.00 |
> | | 40.00 |

The Chief of Finance in said memorandum of August 29, 1941, further recommended "that the claim be returned to this office approved in the amount of \$284.18 for transmittal to the General Accounting Office for settlement under the provisions of AR 35-7040, provided claimant agrees to accept this amount in settlement of his claim."

8. On September 18, 1941, the section chief of Claims and Litigation, Judge Advocate General's Office, wrote a memorandum relative to the claim, for the Secretary of War, the last four paragraphs of which were as follows:

> 4. The Chief of Finance concurs in the recommendation of the board that the claim be allowed, but not in the amount recommended expressing the view that the damage to claimant's household goods was caused by an unprecedented flood, which could not have been reasonably foreseen or guarded against; that the damage was incident to the training, practice, operation, or maintenance of the Army, and that, in addition to the item for which the board recommended payment, two additional items of the value of \$40 are properly for allowance; and recommends that the claim be approved in the amount of \$284.18 under the provisions of Ar 35-7040, provided the claimant agrees to accept that amount in settlement of his claim.
>
> 5. Obviously the assignment of an officer to a designated post of duty and the consequent change of station are incident to the operation of the Army, and the transportation of his household goods and personal effects, at

> Government expense, from his former quarters to his new quarters is an integral part of the change of station and thus also incident to the operation of the Army.
>
> The various prerequisites to entitlement under the act of March 4, 1921, *supra*, are not factors in considering the claim under the provisions of the appropriations for damage incident to training, etc., of the Army, and items which are not allowable under the former act may be allowed under the latter (JAG 153, Mar. 24, 1941).
>
> 6. Accordingly, this officer concurs in the recommendation of the Chief of Finance that the claim be allowed under the provisions of AR 35-7040 in the amount of $284.18, provided the claimant agrees to accept this amount in full settlement of his claim.

9. On September 19, 1941, the Secretary of War approved plaintiff's claim in the amount of $284.18, as recommended by the Chief of Finance, and returned it to the Chief of Finance.

10. On September 26, 1941, the Chief of Finance wrote to the plaintiff, advising him that his claim had been approved by the Secretary of War in the amount of $284.18 for transmittal to the General Accounting Office for settlement and that if plaintiff was willing to accept the $284.18 in full satisfaction and release his claim he should sign the enclosed acceptance forms, date them, and return them in duplicate to the Office of the Chief of Finance. The letter further stated that upon receipt of the forms properly signed the War Department would take the further necessary steps to transmit plaintiff's claim for settlement.

11. On April 16, 1942, plaintiff, from Fort Mills, Corregidor, Philippine Islands, wrote to the Adjutant General, Washington, D. C., a letter as follows:

> 1. Just before war started I received from the Chief of Finance, Washington, D. C., an acceptance blank for a claim of my property lost and damaged at Fort Wm. McKinley, November 11, 1937. This acceptance form was signed and returned to the Chief of Finance.
>
> 2. Due to the fact that it is almost impossible to receive mail here, it is requested that the check be made payable to my wife, Mrs. Milton A. Hill, whose address is Apartment 181 C, 1120 Bolling Avenue, Norfolk, Virginia.

12. On August 28, 1942, the Comptroller General wrote plaintiff a letter denying plaintiff's claim, and as a result of

this ruling of the Comptroller General plaintiff's claim was never paid.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

At the time here involved the plaintiff was a commissioned officer in the Regular Army. By special orders of the War Department March 15, 1937, he was relieved from assignment and duty at Fort Wayne, Michigan, and transferred to duty in the Philippine Department. Pursuant to these orders he traveled from Fort Wayne to Fort William McKinley, Philippine Islands.

Plaintiff's household goods were moved by Army transport overseas, were transshipped at Pier No. 1, Post Manila, Philippine Islands, to lorchas, which carried them thence and they were unloaded therefrom and deposited in the sorting room of the Quartermaster's Receiving Office, Fort William McKinley immediately preceding Armistice Day, November 11, 1937. That day being a legal holiday, no work was done at the receiving office. That afternoon, the Pasig River overflowed its banks, inundating the receiving office about 18 inches. This flooding destroyed or damaged plaintiff's household goods and he sought and now seeks reimbursement for the damage.

The case was tried solely on documentary evidence and the facts recited are based on such evidence. There was no oral testimony.

When first considering plaintiff's claim the War Department treated it as coming under the provisions of the amendatory act of March 4, 1921, 41 Stat. 1436. The relevant portions thereof are as follows:

> SECTION 1. That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulation to own and use in the performance of their duties, and horses and equipment required by law or regulations to be provided by mounted officers, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged, or destroyed in the military service, shall be replaced, or the damage thereto, or its value

recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur without fault or negligence on the part of the owner in any of the following circumstances:

* * * * *

Third. When during travel under orders such private property, including the regulating allowance of baggage, transferred by a common carrier, or otherwise transported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed; but replacement, recoupment, or commutation in these circumstances, where the property was or shall be transported by a common carrier, shall be limited to the extent of such loss, damage, or destruction over and above the amount recoverable from said carrier.

* * * * *

SEC. 2. That except as to such property as by law or regulation is required to be possessed and used by officers, enlisted men, and members of the Army Nurse Corps (female), respectively, the liability of the Government under this Act shall be limited to damage to or loss of such sums of money or such articles of personal property as the Secretary of War shall decide or declare to be reasonable, useful, necessary, and proper for officers, enlisted men, or members of the Army Nurse Corps (female), respectively, as the case may be, to have in their possession while in quarters, or in the field, engaged in the public service in the line of duty.

SEC. 3. That the Secretary of War is authorized and directed to examine into, ascertain, and determine the value of such property lost, destroyed, captured, or abandoned as specified in the foregoing paragraphs, or the amount of damage thereto, as the case may be; and the amount of such value or damage so ascertained and determined shall be paid by disbursing officers of the Army, or such property lost, destroyed, captured, or abandoned, or so damaged as to be unfit for service, may be replaced in kind from Government property on hand when the Secretary of War shall so direct.

SEC. 4. That the tender of replacement or of commutation or the determination made by the Secretary of War upon a claim presented, as provided for in the foregoing section, shall constitute a final determination of any claim cognizable under this chapter, and such claim shall not thereafter be reopened or considered.

* * * * *

Plaintiff's claim went through channels, and on May 12, 1938, the Assistant Secretary of War approved a recommen-

dation made to him that it be disallowed, on the ground that the evidence indicated the goods had been damaged or destroyed while in storage, and not while in transit. What that evidence was is not disclosed.

The plaintiff was not satisfied with this disposal of his claim, protested, and with his protest filed a certificate indicating that the goods were in transit when destroyed or damaged, and not in storage.

Plaintiff's claim, thus newly supported, went through the same channels again, and the examining board found certain facts which are in substance the facts hereinabove recited.

This time plaintiff's claim received favorable administrative action, except that before being referred to the Secretary's office it was forwarded to the Comptroller General, who disallowed it on the ground that the goods were in storage, not in transit, and damages could not be recovered under the act of March 4, 1921, quoted above.

After this disallowance by the Comptroller General the plaintiff's claim received further consideration in the War Department, and this time was referred to the Secretary of War, who approved it in the sum of $284.18, as a claim "under the provisions of the appropriations for damage incident to training, etc., of the Army." The provisions so referred to are obviously those contained in Section 223, Title 31 of the U. S. Code.

Section 223, Title 31, of the U. S. Code reads:

> Settlement of claims, including claims of military and civilian personnel in and under the War Department, not exceeding $500 each in amount for damages to or loss of private property incident to the training, practice, operation, or maintenance of the Army that have accrued, or may hereafter accrue, from time to time, shall be made by the General Accounting Office, upon the approval and recommendation of the Secretary of War, where the amount of damages has been ascertained by the War Department, and payment thereof will be accepted by the owners of the property in full satisfaction of such damages.

There is no doubt that if these goods were in transit pursuant to the officer's travel orders, any disbursement for damage would be under the act of March 4, 1921, and not under the

successive appropriation acts codified as Section 223, Title 31, U. S. Code. *Regnier* v. *United States*, 92 C. Cls. 437.

However, the act of March 4, 1921, mentions neither "transit" nor "storage". It says compensation is recoverable when loss, damage, or destruction occurs "during travel under orders." When used with reference to a movement by private or common carrier, the word "travel" is more often applicable to a voluntary agent than to inanimate objects such as household goods.

Orders of course are directed to an officer and not to his goods. "Travel under orders", in a fair and reasonable interpretation of the statute, has reference to that which was undertaken pursuant to the travel orders, and the period covered, in relation to the household goods, may extend beyond the period of the officer's own travel. He may well conclude his own travel before his goods reach the destination specified in the travel orders.

The goods here did not reach their destination until they were placed at the disposal of the officer. If the situation at time of loss, damage, or destruction, was such that they were awaiting the officer's disposition of them, they might be considered as at the end of the transportation permitted under the travel orders, although that matter need not here be determined, for they were still in the sorting room. They had to be assorted, for one of at least three purposes, for delivery to the officer, for further transportation, or for placement in storage.

It was fair to the officer that when on account of the travel orders he lost control of his goods and could take no measures of his own for their protection and preservation, he should be made whole for their loss, damage, or destruction. The statute limits recovery to situations where the loss, damage, or destruction has occurred without fault or negligence on the officer's part.

That the Secretary of War mistakenly gave his final approval to plaintiff's claim under Sec. 223, Title 31, U. S. Code, instead of the act of March 4, 1921, is immaterial, for his decision as to such application was a conclusion of law, not binding on the Court. It may very properly be inferred from the record that the administrative officers, confronted

with an adverse decision with respect to the act of March 4, 1921, concluded that as an alternative Sec. 223, Title 31, of the U. S. Code might be available. And that is apparently all that the decision of the Secretary of War on the law amounted to.

"A construction of a statute which produces a consequence opposed to the spirit of the legislation is to be avoided if possible." *Builders' Club* v. *United States*, 83 C. Cls. 556, 560. "Statutes should have a reasonable construction and the language must be interpreted with reference to the subject matter and the general course of business to which they relate and in such manner that the beneficient provisions of remedial laws may not be thwarted by nice technicalities obviously not within the minds of the legislators." *Siegel et al.* v. *United United*, 84 C. Cls. 551, 558.

Plaintiff is entitled to recover $284.18. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

STANDARD ACCIDENT INSURANCE COMPANY AND ALBERT E. McKENZIE AS TRUSTEE IN BANKRUPTCY OF THE GRAVES-QUINN CORPORATION v. UNITED STATES

[No. 46004. Decided April 2, 1945]*

On Defendant's Demurrer

Government contract; no breach of contract by sovereign acts of defendant.—Where contractor entered into a contract with the Government September 14, 1940, for the construction of certain buildings, on a lump-sum basis; and where, thereafter, the Government entered into cost-plus contracts with other contractors for the construction of other Government facilities in the immediate vicinity, which resulted, as alleged, in making it difficult to obtain an adequate supply of labor and also in increasing the cost of materials; it is *held* that there was no breach of the contract in suit by the defendant, and defendant's demurrer is sustained.

*Plaintiff's petition for writ of certiorari denied.

Same; no stipulation, express or implied, as to other contracts in vicinity.—The contract in suit contains no express stipulation that contracts on a cost-plus fixed-fee basis would not be made, if necessary, and none can be implied.

Same; knowledge of Defense Acts by parties to contract in suit.—Both parties to the contract in suit knew of the existence of the National Defense Acts and Appropriation Acts of June 28, July 2 and September 9, 1940, when the lump-sum contract of September 14, 1940, was made, and it must be assumed that they knew that the carrying out of these Acts, by contract or otherwise, would be a sovereign act and not a breach of the contract then being made.

Same; deletion of certain provisions of standard construction contract.—The contract in suit, by deletion from its provisions of article 11 of the standard Government construction contract form, prohibiting the working of any laborer or mechanic more than 8 hours in any calendar day, recognized the existence and effect of the National Defense Acts of 1940 and the Appropriation Act enacted in accordance therewith.

Same; acts of sovereign can not modify or violate existing Government contracts.—As early as *Jones and Brown* v. *United States*, 1 C. Cls. 383, the Court of Claims held that: "Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, can not be deemed specifically to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons." See also *Horowitz* v. *United States*, 58 C. Cls. 189, affirmed 267 U. S. 458; *Maxwell* v. *United States*, 3 Fed. (2d) 906, affirmed 271 U. S. 647.

Mr. M. Carl Levine for plaintiff.

Mr. David Morgulas was on the brief.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Mr. E. E. Ellison was on the brief.

LITTLETON, *Judge*, delivered the opinion of the court:

The petition in this case alleges three causes of action by plaintiff, Standard Accident Insurance Company, the third cause of action being also the first and only cause of action alleged by plaintiff Albert E. McKenzie as trustee in bankruptcy. Defendant's demurrer is directed to the third cause of action of the Standard Accident Insurance Company and as a first cause of action by Albert E. McKenzie as trustee in bankruptcy.

The petition in the first cause of action on behalf of the Standard Accident Insurance Company, as surety on a performance bond of the Graves-Quinn Corporation under a contract with defendant, claims $72,976.07 as the excess costs incurred by reason of alleged misrepresentations in the specifications and drawings as to conditions at the site of the work. The second cause of action is for recovery of $15,245 deducted by defendant as liquidated damages for delay in completion of the contract. The third claim, made as a third cause of action by the Standard Accident Insurance Company and as a first cause of action by Albert E. McKenzie as trustee in bankruptcy in the Graves-Quinn Corporation, is for damages of $397,200 for alleged breach of the contract by the defendant.

On September 14, 1940, the Graves-Quinn Corporation, hereinafter sometimes referred to as the contractor, entered into a contract with the Government through the Quartermaster Corps of the War Department for construction of temporary housing at Harbor Defenses at Boston, Mass., Narragansett Bay, and at Newport, Rhode Island, and Portland, Maine, for the consideration of $1,008,800.

The contractor was adjudicated a bankrupt by the U. S. District Court for the Second District of New York June 19, 1942, and Albert E. McKenzie, one of plaintiffs herein, is the duly appointed and acting trustee in bankruptcy.

The allegations in the petition in support of the claim for damages for breach of contract as the third cause of action by the Standard Accident Insurance Company and as a first cause of action by Albert E. McKenzie, as trustee in bankruptcy (hereinafter referred to as "the third cause of action"), are that immediately after award of the contract of September 14, 1940, defendant, through its duly authorized agencies, made contracts with other contractors for the construction of various Government facilities in the immediate vicinity of the project covered by the contract with the Graves-Quinn Corporation, which other contracts were, for the most part, let upon a cost-plus fixed-fee basis.

It is further alleged that by reason of the awards of such other contracts the Graves-Quinn Corporation was unable to employ laborers and mechanics in the normal course, unless it

permitted laborers to be employed for longer hours, resulting in payment of overtime wages because such workmen were drawn to the cost-plus projects.

It is further alleged that as a result of the making of these cost-plus contracts the Graves-Quinn Corporation was left with insufficient sources from which to draw its laborers; and that an additional result of the making of these cost-plus contracts by the Government was to raise material prices in the immediate vicinity, thereby forcing the Graves-Quinn Corporation to pay higher prices for material necessary for the performance of its lump-sum contract.

It is further alleged that at the time defendant advertised for bids on the contract with the Graves-Quinn Corporation, defendant knew that it intended to enter into such cost-plus contracts for other projects, and that any contractor having a lump-sum contract in the immediate vicinity would be compelled to meet the abnormal circumstances not originally contemplated. It is also alleged that it was contemplated and understood that the Government would do nothing which would interfere or prevent the ordinary and contemplated method of performing the contract of September 14, 1940, and that it cost the contractor $397,200 more to complete the work called for by that contract than it would have cost had the contract been carried out as originally contemplated. The alleged damages of $397,200 above mentioned represent the difference between the alleged cost of $1,310,547.27 of performing the contract of September 14, 1940, and $913,347.27 which, it is alleged, such performance would have cost had the Government not entered into certain other cost-plus fixed-fee contracts in the same vicinity under authority of the National Defense Acts approved June 28 and July 2, 1940, and the appropriation act approved September 9, 1940 for carrying these acts into effect.

Plaintiffs contend in opposition to the demurrer that the making of such cost-plus contracts constituted a breach of the lump-sum contract of September 14, 1940, in that the making of such contracts by the United States through agencies of the War Department made it difficult for the contractor to obtain an adequate supply of labor, thereby compelling it to work its laborers overtime at increased wages; to obtain material

in the normal course, and increased the cost of the needed materials. In support of this contention it is argued that at the time the Government advertised for bids for the lump-sum contract it had full knowledge that it intended to enter into very substantial construction contracts at Camp Edwards and Camp Devens on a cost-plus fixed-fee basis and that the Government knew that as a result thereof any contractor having a lump-sum contract in the immediate vicinity would be compelled to meet the above-mentioned circumstances not contemplated or agreed to by the contractor; that the contractor had the right to expect that the War Department had entered upon a policy of awarding lump-sum contracts in the immediate vicinity of the construction work; that the War Department then had two alternatives and, having adopted one, the contractor had no reason to believe that immediately thereafter the Government would adopt the policy of entering into cost-plus fixed-fee contracts.

We think these contentions of plaintiffs are not sufficient to show that there was a breach of the contract in suit by the defendant which would entitle the contractor or plaintiffs to recover the alleged increased performance costs as damages. The allegation of the petition that "It was contemplated and understood that the Government would do nothing which would interfere or prevent the orderly and contemplated method of performing the contract" of September 14, 1940, cannot be taken as an allegation of fact well pleaded and admitted for the purpose of the demurrer that it was contemplated and understood by the United States that it would not enter into such other contracts as might be deemed necessary to carry out and fulfill the requirements of existing acts of Congress making provisions for the National Defense. If, by the allegation above quoted, plaintiffs intended to allege such a stipulation and undertaking on behalf of the United States it is clear that such a stipulation would have been in violation of the acts of Congress and, therefore, beyond the authority conferred upon the contracting officer. It is not alleged that the contract in suit was signed by the Secretary of War, who was the officer charged by statute with the duty of determining whether, in the interest of the Government and the National Defense, cost-plus contracts and

contracts without advertisement should be made. However, the contract in suit contains no express stipulation or warranty that contracts on a cost-plus fixed-fee basis would not be made if necessary, and none can be implied. Both parties knew of the existence of the National Defense and Appropriation acts of June 28, July 2, and September 9, 1940, and it must be assumed that in making the lump-sum contract of September 14, 1940, they knew also that the carrying out of those acts by contract, or otherwise, would be a sovereign act and not a breach of the contract then being made. Under the terms of the contract in suit, the contractor assumed the risk of meeting the changed conditions of which complaint is now made. It cannot be said, therefore, as plaintiffs contend, that the Graves-Quinn Corporation had a legal right to expect, when it made its bid on September 10 and signed the contract on September 14, 1940, that the War Department had entered upon a binding policy of awarding lump-sum contracts in the immediate vicinity of the contractor's construction and could not thereafter, without breaching the contract of the contractor, enter into other contracts on a cost-plus basis pursuant to and in accordance with the National Defense statutes which would have the effect of making performance of a lump-sum contract more expensive than the contractor had contemplated at the time he made his bid. Plaintiffs' contract expressly recognized the existence and effect of the National Defense and Appropriation acts above mentioned by deleting from the standard contract form art. 11 prohibiting the working of any laborer or mechanic more than eight hours in any calendar day.

As early as *Jones and Brown* v. *United States*, 1 C. Cls. 383, this court held (p. 384) that "Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specifically to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons." The same rule was applied in *Horowitz* v. *United States*, 58 C. Cls. 189, affirmed 267 U. S. 458, and in *Maxwell et al.* v. *United States*, 3 Fed. (2d) 906, 909–911. In affirming the *Maxwell* case, the Supreme Court (271 U. S. 647) held generally that a contractor

must assume the risk of such obstacles in the performance of an obligation, the scope of which is clearly fixed by his contract.

Defendant's demurrer is sustained and the petition is dismissed as to Albert E. McKenzie, trustee in bankruptcy, and as to the third cause of action of the Standard Accident Insurance Company.

The case is remanded to the General Docket on the first and second causes of action alleged by plaintiff, Standard Accident Insurance Company. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

YORK ENGINEERING AND CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 45282. Decided February 5, 1945. Plaintiff's motion for new trial overruled June 4, 1945]*

On the Proofs

Government contract; agreement to employ labor from relief rolls; delay due to shortage of labor.—Where plaintiff entered into a contract with the Government in August 1935, to build a lock and dam in the Allegheny River in a rural area in Pennsylvania; and where article 19 of the contract stipulated that the contractor, with certain exceptions, should obtain at least 90 percent of the labor from the relief rolls, through the United States Employment Service; and where labor not on the relief rolls was referred to plaintiff by the Employment Service when relief roll labor was found to be not available; it is *held* that delay in completion of the contract due to shortage of labor was not caused by a breach of the contract by the defendant and plaintiff is not entitled to recover.

Same; no agreement by Government to supply all labor needed.—Article 19 of the contract in suit was not an agreement by the Government to supply to the contractor all the labor needed, and failure to supply labor from the relief rolls or from outside the relief rolls when sufficient labor was not available was not a breach of the contract. *Young-Fehlhaber Pile Company* v. *United States*, 90 C. Cls. 4, distinguished.

*Plaintiff's petition and defendant's petition for writ of certiorari pending.

Same; not reasonable to expect that labor possessing skill and experience could be supplied.—Where the contractor's requests to the United States Employment Service for labor contained specifications as to the skill and experience of the laborers desired that could not reasonably be met with in a rural community; and where the work was disagreeable and unusual in nature; it is *held* that it was not reasonable to expect, in the time and place, that the United States Employment Service could supply, either from the relief rolls or other sources, labor so qualified and in the amount necessary to complete the job.

Same; Government does not agree to pay new or increased taxes.—The Government does not, in its contracts, agree to pay any new or increased taxes of general application imposed by a State or by itself. Compare *United States* v. *Standard Rice Co.*, 323 U. S. 106, affirming 101 C. Cls. 85.

Same; contractor forced to increase wages by action of Government in raising wages on WPA jobs in vicinity.—Where the Government, by its action in raising the wages of WPA laborers in the vicinity made it necessary for the plaintiff to increase wages, in order to hold its workmen; it is *held* that the plaintiff is entitled to recover, following the decision in *Beuttas* v. *United States*, 101 C. Cls. 748.*

The Reporter's statement of the case.

Mr. Robert P. Smith for the plaintiff. *Mr. William Ristig* was on the briefs.

Mr. W. A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The York Engineering and Construction Company, hereinafter referred to as the plaintiff, is a partnership engaged in the contracting business, in which R. W. Smith and S. W. Harbold are equal partners.

2. On August 5, 1935, plaintiff and the United States entered into an agreement designated ER–W1101–eng.–3 by the terms of which plaintiff agreed to furnish all materials and do all the work necessary for the construction of lock and Dam No. 9, Allegheny River, and alterations to Dam No. 8, Allegheny River, in strict accordance with the drawings, specifications and conditions of the agreement for which work the United States agreed to pay plaintiff $1,-822,184.74 (estimated), and to pay such increased amounts

*See 324 U. S. 768.

or to make such deductions as the parties might be entitled to under the terms of the agreement. A copy of the contract and specifications have been admitted in evidence as plaintiff's exhibit 2, and are made a part hereof by reference. The contract provided that work should be commenced within ten calendar days after receipt of notice to proceed and should be completed within 450 calendar days after date of notice to proceed. Plaintiff received notice to proceed September 25, 1935.

During the several years the contract work was being done the contract was modified by nineteen change orders pursuant to which the contract price was increased and the time for completion was extended 468 calendar days making the revised date of completion March 31, 1938. Thereafter, on appeal to the Chief of Engineers, plaintiff was allowed 189 additional days, i. e., to October 6, 1938, and completion of all the work under the contract was accepted on or before that date. By reason of the last extension of time, liquidated damages in the sum of $50,375 which had been deducted were excused and paid to plaintiff.

3. The contract provided among other things as follows:

> ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay

until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, insufficient supply of qualified labor from offices designated by the United States Employment Service, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ART. 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ART. 18. (a) The contractor and all subcontractors shall pay all employees directly employed on this work at the site thereof at not less than the wage rates set forth in the specifications. (The minimum wage rates therein established shall be subject to change by the contracting officer, and in the event different minimum wage rates are so established, the contract price shall be adjusted accordingly on the basis of all actual labor

and compensation insurance costs on the project to the contractor, whether under this contract or any subcontract.)

ART. 19. (*a*) *Labor preferences.*—With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2, (*a*) such persons shall be referred for assignment to such work by the United States Employment Service, and (*b*) preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least ninety per centum (90%) of the persons employed on any project shall have been taken from the public relief rolls; *Provided however*, that, expressly subject to the requirement of subdivision (*b*), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service. * * *

The specifications provided in part as follows:

1–25. *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See Articles 3 and 15 of the contract.)

1–09 (d). *Ice.*—No exact information is available as to the extent of ice formation on the Allegheny River at the site, but in general, ice forms about the middle of December and the river usually stays frozen over until the first part of March. Numerous ice gorges usually occur along the river during the break-ups. It has been the practice with shipping interests to suspend navigation during the period of ice and withdraw floating plant to a safe harbor.

Paragraph 1–30 (b) of the specifications set the minimum wage for unskilled work at 45 cents an hour.

4. The lock was constructed by the use of a cofferdam built along the west bank of the river parallel with the stream, according to specifications, using the open-cut method of excavation, which plan was approved by the contracting officer.

5. The foundations and structure of the dam were constructed by means of sinking 21 caissons from the structure of the lock location to the abutment on the opposite side of the river, and that method of construction, and the plans and blueprints showing that method were approved by the contracting officer.

6. In calculating its bid and preparing its plans for carrying on the work plaintiff contemplated working during the winter months as far as practicable, until the weather became too severe, and planned to complete the entire project in 1936. Plaintiff received notice to proceed on September 25, 1935, but had performed considerable work prior to that date. Shortly after the work began in the fall of 1935, an unsatisfactory condition was discovered in the rock foundation for the lock, which condition made necessary considerable extra work, caused material changes in the plans, and resulted in change orders Nos. 2 and 5, which increased the price of the project by approximately $250,000 and extended the contract time by 185 days, or until July 1937. These change orders were accepted by plaintiff in writing. The work proceeded until mid-winter when, by reason of unusually severe weather, plaintiff closed down the project from January 5, 1936, until April 24, 1936. By change order No. 33 plaintiff was granted 111 days' additional contract time on account of unusually severe weather, which change order was accepted in writing by plaintiff.

Plaintiff resumed work in the spring of 1936 and carried it on through that year, expecting to complete the project, including the extra work, early in July 1937. However, plaintiff closed down the project for the winter period on December 5, 1936, and resumed work March 24, 1937. Early in 1937 plaintiff formulated a new progress chart, expecting to complete the project by November 1937, but failed to do so and again closed the project down from November 24, 1937, to April 24, 1938, when it resumed work and completed the project, which was accepted by the defendant on October 7, 1938.

7. The National Reemployment Service (hereinafter referred to as "NRS"), an agency of the U. S. Employment

Service, designated its branch offices at Greensburg in Westmoreland County, and Kittanning, in Armstrong County, Pennsylvania, as the offices from which plaintiff should requisition labor, but during the course of the contract the office at Kittanning was discontinued and operations were confined to the Greensburg office.

8. The immediate vicinity of plaintiff's project was rural. Kittanning and Greensburg were the principal large towns in the counties mentioned. Kittanning had a population of approximately 7,500 and was about 9 miles from the work, while Greensburg was about 45 miles from the work and had a population of approximately 16,000. There were 3 or 4 small villages within a few miles of the project, each having a population of a few hundred. There were a large number of coal mines in Armstrong County and a high percentage of its working people were coal miners. Prior to and at approximately the time plaintiff's project was commenced there were a large number of persons on relief in the two counties, enough to supply plaintiff's project with the required amount of labor. However, under Federal and other programs, projects were undertaken to relieve this unemployment, and at the time plaintiff's project was in operation much of the relief labor was being absorbed by those projects. Plaintiff's project required normal employment of from 600 to 650 workmen, approximately 75% of whom were equally divided between carpenters and common laborers.

9. Prior to bidding on this contract plaintiff visited the site of the work and the general community, and made an investigation of the available supply of labor to be had from relief rolls in the vicinity of the project and had knowledge of the conditions existing. Plaintiff believed that there would be an ample supply of the type of labor necessary to properly staff the job.

10. The procedure for requisitioning and referral of workmen to plaintiff's project was explained to plaintiff by NRS during the early part of the job. At the beginning of the project, when a requisition came in, the NRS office selected from names of workmen registered in its office all persons in the categories requisitioned who were on relief,

considered their qualifications for employment and referred to the contractor those it deemed qualified. Subsequently, the procedure was changed so that when a requisition was received at the employment office, NRS would requisition from the Works Progress Administration (hereinafter referred to as "WPA"), sufficient relief labor to refer to the contractor, and WPA made labor available for such referral to NRS in the following categories: First, from persons then working on WPA projects; second, from persons awaiting reassignment to WPA projects; and third, from persons awaiting initial assignments to WPA projects. In the event that those three categories did not provide sufficient labor, WPA was then required to give NRS an exemption from the referral of relief labor, and nonrelief labor was referred to the project.

A worker referred would be given a referral or assignment slip which he was to take to the contractor and present himself as an applicant for work. Duplicates of this assignment slip were also mailed to the contractor, who was to advise NRS as to whether the man was hired.

11. Plaintiff claims that it was caused delay and increased costs because of an insufficient supply of qualified labor at the times required.

Frequently the NRS was unable completely to fill plaintiff's requisitions for workmen, and in such instances obtained exemptions from WPA so that nonrelief labor might be referred to plaintiff. In some instances where exemptions were first obtained, the time required in obtaining the exemptions, according to the rules provided for that purpose, was considerable and the plaintiff was short of labor during the delay. Once the exemptions were obtained, they remained in effect throughout the performance of the contract.

An instance of delay in originally obtaining exemptions is that on or about August 13, 1935, plaintiff requisitioned six crane and shovel operators. NRS was unable to furnish them, and plaintiff asked that they be obtained from nonrelief labor. Under the procedure provided for obtaining exemptions at the time, the Pennsylvania State Director

notified the contracting officer by telegram. The U. S. Engineer Office then contacted the State Director of NRS in New York as well as similar officials of Ohio and West Virginia, who replied that they likewise were unable to supply the required labor. Then the contracting officer telegraphed the Chief of Engineers requesting exemptions for the desired labor, which were granted. Under the exemptions NRS was authorized to furnish operators from nonrelief sources. This procedure required until approximately August 28, 1935, during most of which period plaintiff suffered delay.

The same procedure was followed with similar experience when plaintiff was not supplied with an electric whirley operator who had been requisitioned. After 18 days' delay the exemption was granted.

On September 10, 1935, plaintiff advised the defendant that it was having trouble securing crane operators and pile drivers and stated: "I am personally taking the liberty this afternoon to telephone experienced crane operators to report at once for work * * *." In the meantime the usual procedure was in progress for securing exemptions of 18 crane operators, which exemptions were secured from WPA on September 16, 1935, after a delay of six days.

On October 26, 1935, plaintiff wrote to the contracting officer regarding labor difficulties and requested that liquidated damages be waived or that plaintiff be given authority to secure labor from any source. November 18, 1935, the contracting officer advised plaintiff that there was no basis for a time extension due to the labor situation as it had existed to that date, and that he was not authorized to permit the contractor to work labor except through NRS. Plaintiff took no appeal from this ruling.

On November 11, 1935, plaintiff advised defendant of difficulties in securing carpenters and form builders for whom requisitions had been made October 28, 1935, and stated that unless carpenters and form builders were supplied it would be necessary to work the carpenters they had in excess of 130 hours per month. November 15, 1935, plaintiff was advised that steps were being taken to secure exemptions for the necessary labor and that pending action

on these exemptions form builders were requested to exert every effort to train such semiskilled labor as might be feasible. In the meantime, after much discussion by telegram and letter regarding exemptions of carpenters and form builders, exemptions for 25 carpenters were granted, December 13, 1935.

On December 11, 1935, due to shortage of labor on relief rolls, the Engineer Office granted plaintiff permission to employ manual labor not more than 8 hours in any one calendar day and not more than 40 hours in any one week. Again, on May 13, 1936, due to inability to supply carpenters and carpenter helpers for the project, the defendant authorized plaintiff to work them not more than 8 hours in any one calendar day nor more than 56 hours in any one calendar week. Again on June 19, 1936, due to shortage of tractor operators, plaintiff was permitted to employ men of that classification not more than 8 hours in any one calendar day nor more than 56 hours in any one calendar week.

On June 19, 1936, plaintiff wrote the defendant's office at Pittsburgh that of 50 carpenters requisitioned on May 8, 1936, only about 25 had reported and that a further requisition was issued June 5th, and that mainly through plaintiff's efforts several carpenters had been obtained; that due to shortage of labor the work had slowed down to about 50%, concrete pours were becoming smaller and carpenter work increasing daily, and that plaintiff would be unable to operate under these conditions.

On April 3, 1937, plaintiff wrote NRS relative to labor conditions, advising of eight instances of issuance of requisitions for workmen where the requisitions were but partially filled, and asking for relief from this situation. April 15, 1937, defendant's Engineer Office advised plaintiff that due to unobtainability of labor in the various classifications desired, in the emergency, authority was given to employ labor not more than 8 hours in one calendar day and 56 hours in one calendar week.

12. The following table shows the number of workmen requisitioned by plaintiff, the number of workmen reporting to plaintiff after being referred by NRS, and the number of

days of excused delay granted by defendant because of insufficient labor:

Year	Workmen requisitioned	Workmen reporting	Additional days granted	Change order
1935	422	137	14	No. 3.
1936	314	93	30	No. 9.
1937	510	147	87	No. 16.
1938	185	61	18	No. 18.

The determination of the number of days of excused delay granted the plaintiff as shown in the foregoing table, was arrived at by the use of an erroneous formula. A more nearly correct computation gives the number of days' delay, during the years 1935, 1936, and 1937 as 103 instead of 131 as shown in the table.

13. WPA, which made relief labor available to NRS for referral, declined in some instances to make available for referral to plaintiff and other projects, workmen who were on relief but who were employed on projects carried on under its own supervision, which concerned the health and public safety of the general community and from which the authorities felt they should not remove their relief labor. There were also instances where the WPA declined to make available to plaintiff's project workmen who lived a considerable distance from the project, by reason of the transportation and boarding difficulties to which workmen would be subjected, if required to work at plaintiff's project.

14. NRS under its rules and regulations referred to plaintiff's project all available labor of various classifications on its lists. It also referred men whom plaintiff had requested to be assigned to the project, even though such men were not on relief, where it had an exemption from WPA for men of the classification requested.

15. A considerable amount of plaintiff's work was unpleasant and relatively undesirable because it was performed in the river and necessitated men wearing heavy boots and working in water. At times during the fall and approaching winter there were occasions when snow, ice, rain and cold prevented plaintiff from carrying forward the work for more than two or three days a week, and the workmen were unable to earn enough in a week to make the job worth

while, considering their weekly expenses. By reason of these conditions plaintiff's project was unattractive to workmen. Some workmen would not accept employment on the project, and quite a number of men quit their jobs with plaintiff and went to the coal mines and to other projects which afforded better wages and more satisfactory working conditions. Plaintiff granted releases to many workmen at such times as it could not give the men enough work so that they could earn reasonable wages. Defendant's representative on the job also granted releases to men for physical infirmity or other reasons which appeared to justify such action.

Plaintiff in ordering its labor from the Employment Service specified qualifications for the workmen it desired. On August 24, 1938, it ordered 15 carpenters, the requisition reciting that they "must have thorough knowledge of the trade and have tools; previous experience on dam construction necessary." May 7, 1938, plaintiff requisitioned 3 crane operators, the requisition stating that "they must be thoroughly experienced in operation, care and adjustment on Lorain 75-A crane and shovels." May 8, 1938, plaintiff ordered 1 dipper tender, the requisition stating that "he must have had at least 10 years' experience in operation of dipper or dipper dredge." Also 3 dredge firemen who must be "thoroughly trained and experienced in firing boilers of all types of floating equipment; cleaning flues and installing and repairing tubes; operating spudding engine, niggerheads, etc., and shall operate dredge in emergencies." Also 4 deckhands who shall have "extensive experience on naval equipment, skilled in throwing lines, etc." Also 1 cook who "shall have at least 10 years' experience as cook on floating equipment." June 21, 1938, plaintiff ordered 4 laborers who must be "physically fit, willing to do a fair day's work and have previous experience on dam construction." July 7, 8, and 9, 1938, plaintiff ordered 150 laborers who must be "physically fit and willing to do a fair day's work with pick and shovel. Will be required to work in water and must report for work supplied with hip boots."

16. The effect of the conditions hereinbefore described was that frequently a sufficient supply of labor was not available

for reference to plaintiff's project and plaintiff was seriously delayed in carrying on its work efficiently and in accordance with its progress schedule.

17. Plaintiff was granted extensions of contract time on account of insufficient labor during 1935, 1936, and 1937, totaling 131 days, as follows:

Change order No. 3, dated April 27, 1936, granted an extension of 14 days, covering the work period of 1935.

Change order No. 9, dated February 6, 1937, granted an extension of 30 days, covering the year 1936.

Change order No. 16,[1] dated December 31, 1937, granted an extension of 87 days, covering the year 1937.

The change orders contained the following provision:

> It is further understood and agreed that all other terms and conditions of said contract as modified by change orders numbered * * * shall be and remain the same.

Each of these change orders was based on a letter of the contracting officer to plaintiff making findings of fact and giving his determination thereon, which contained the following provision:

> Should you not agree to this finding of facts, you have the right to appeal under Article 9 of your contract. Your attention is specifically directed to the fact that your appeal must be made within 30 days in order to receive consideration. Appeals should be addressed as follows: To the Chief of Engineers, U. S. Army, * * *

Plaintiff did not protest or appeal in writing to the head of the department from the contracting officer's letters containing findings of fact, or from the change orders, but accepted the change orders in writing.

Plaintiff was aware when these change orders were executed that its work was being retarded by reason of an insufficient supply of labor.

18. The specifications provide in paragraph 2–01 (2) as follows:

> (2) *Dam.*—The dam shall be constructed in three or more successive cofferdams starting at the abutment side

[1] The subject matter of change order No. 16 was subsequently involved in another request by plaintiff which is considered in finding No. 25.

and inclosing such lengths of dam as may be proposed by the contractor and approved by the contracting officer. (See paragraph 1-03A.) The upper arm of the final cofferdam shall be built to an elevation not less than three feet higher than the crest of the dam. For the passage of water during the latter stages of the construction, the first 700 feet of dam shall be constructed with temporary openings aggregating in length not less than 300 feet and extending from elevation 800.0 to the crest. After the closing section of the dam has been completed the openings shall be closed by watertight bulkheads on the upstream and downstream sides and pumped out and the dam then completed in accordance with the contract plans. The construction of the lock and the abutment of the dam may proceed simultaneously but the work within the cofferdam of the lock shall have been completed, with the exception of Part "D," and the lock cofferdam entirely removed before the river is obstructed by any cofferdam used in connection with the construction of the dam. The first cofferdam for the dam shall enclose not more than 320 linear feet of permanent work and the second cofferdam not more than an additional 320 feet of permanent work. The remaining work to be done in the final cofferdam. For the protection of the river wall of the lock during the period when navigation is being passed through the temporary channels, the contractor shall construct and maintain in place at the upper end of the river wall a substantial floating timber crib approximately 4 feet in depth, 4 feet in width, and 100 feet in length and shaped to the bevel of the wall. The cost of this work shall be included in the unit price bid for cofferdam, and no payment for work or materials used for this purpose will be made under the unit prices bid for the permanent work.

Paragraph 3-01 (d) of the specifications reads as follows:

(*d*) *Caissons.*—The foundation structures of the dam and abutment up to elevation 795.0 may be placed by means of caissons. If the contractor proposes to use this method of construction he shall submit to the contracting officer for his approval, detailed drawings of the design of the caissons and a complete description of the methods proposed. No method of construction shall be used that is not approved by the contracting officer.

Caissons shall be built on steel cutting edges and shall be properly reinforced to withstand all stresses incident

to sinking. 5.5 bags of cement shall be used for each cubic yard of concrete from the cutting edge to a level four feet above the roof of the working chamber. Dredging wells shall be circular in section and not more than eight feet in diameter.

The defendant contends that plaintiff suffered material delay during the winter months by its failure to build cofferdams within which to construct the dam across the river.

19. In carrying on its work, plaintiff did not build cofferdams within which to build the dam, but constructed the foundations and structure of the dam by means of sinking 21 caissons from the structure of the lock location to the abutment on the opposite side of the river. (See finding 5.) The caisson method chosen by plaintiff was in accordance with sound engineering principles and was believed by plaintiff to be best adaptable to the conditions under which the work was to be performed. The drawings for the caisson work were approved by the contracting officer who, with knowledge that no cofferdam was built, approved plaintiff's action in thus carrying on the work. The proof does not show that plaintiff's method and action caused more delay than if cofferdams had been constructed.

20. In 1937 plaintiff found it necessary to change its plans for carrying on the work. Plaintiff had originally contemplated diverting the water of the river through the lock, thus permitting work on the dam breast during 1937. The defendant's engineers declined to permit this method of carrying on the work, on the ground that the foundation of the lock might be washed out if both the upper and lower gates were opened, and that too great a strain might be placed upon the gates by the force of the current of the river. Plaintiff was materially delayed by having to make this change in its plans.

The decision of the contracting officer disapproving plaintiff's proposed method was orally communicated to plaintiff who did not request a written decision by that official. Plaintiff did not protest or appeal in writing from the determination of the contracting officer, but accepted his decision as final and proceeded with the work.

It is not shown by the proof that defendant's engineers and the contracting officer acted unreasonably in disapproving plaintiff's proposed method of work.

21. Plaintiff closed down its work during the winter period of 1936–37, and on November 18, 1937, approximately a year later, requested an extension of contract time to cover this period. Plaintiff's letter, in part, stated:

> Our main reason for cessation of operations during the winter of 1936–37 was that of our inability to maintain a sufficient labor force to carry on our work with any degree of satisfactory progress. As will be noted in the succeeding portion of this letter, operating conditions at this season of the year are such that a worker is not able to draw more than one or two days' time per week. This condition is brought about by the fact that many times a form must remain for a week before the temperature is high enough to allow us to commence a pour. This unworkable time is due further to inclement weather, flood, and ice jams.
>
> Not only was it impossible to maintain an organization because we were unable to provide enough work for the worker to earn a living wage, but also because one of the main livelihoods in this section is that of coal mining, which industry flourishes and attracts the local labor during the winter season. It is therefore not surprising that a great majority of our workers revert back to this industry, it not only paying more than an average wage, but also giving them assurance of better working conditions and steadier employment during cold weather.
>
> The situation is further aggravated by the fact that projects were started and carried through the winter, tending to take up the persons not gainfully employed. This work was such that it was not affected by the winter weather, thus giving a steady income to its workers. Said projects were also more desirable in that they were in closer proximity to the individual's home.
>
> The shortage of labor is by no means a new hindrance in the carrying on of our work. Both Change Order No. 3 and Change Order No. 9 contain extensions of time on this account. Inasmuch as extensions of time have been granted for labor shortage during the summer season, it naturally follows and is not surprising that such a shortage is exceedingly more prevalent during the winter months.

Not only is our request made on the basis of an inevitable labor shortage, but we feel that we are further substantiated in our claim by reason of weather and river conditions which we recount later in this letter.

* * * * *

In addition, we wish to bring to your attention the following fact: At the time this contract was signed, we were permitted 450 days to complete the project. From Page E of the Specifications, Par. VIII (c), it is evident that the 450 days so allowed were to include all necessary delays due to high water and inclement weather. To date sixteen change orders have been executed. Every one, of course, has carried with it an agreed amount of time to complete the specific work therein stipulated. However, no time has been allowed by your office for inclement weather, high water, etc., which might be encountered during the prosecution of this extra work.

Incidentally, it may be truthfully said that the incorporation of this work within our original contract is the primary reason why this project at the beginning of the 1937–38 winter season, has not already been completed. We also wish to add that the alteration of our contract quantities has not only given us ground for additional time extension, but also it has created an additional fixed expense which could not have been foreseen at the time our bid was submitted.

In view of the facts as outlined above and the information at hand, we feel that our request for an extension of time as stated is certainly in order and that such extension is reasonably forthcoming.

February 5, 1938, the District Engineer wrote a fact-finding report which concluded that:

a. The contractor has presented no facts to show, nor do the records indicate that he would have experienced any material labor shortage during the 1936–37 winter season, had he chosen to continue operations.

b. The shutdown was a result of the contractor's own volition; was not required or approved by this office, and was not necessitated by any unforeseeable conditions.

c. The contractor failed to protest my decision on this matter until approximately one year after it was given.

d. Had work been in progress, it would probably have been delayed 21 days by flood conditions.

e. There were 5 periods of "severe" weather, totaling 30 days, during the winter of 1936–37. However, no extremely low temperatures were recorded and the winter was, generally speaking, mild for the section of the country involved.

On February 23, 1938, in connection with its request for an extension of time for the winter period of 1936–37, plaintiff again wrote the District Engineer as follows:

> Furthermore, in reference to Par. 8 (*c*) (2) of your report—"without the addition of any extra work to the contract, the work would not have been completed by the winter of 1936–37. The contractor's contention that it could have been completed prior to the 1937–38 winter season is, in my opinion, irrelevant in considering the instant claim," we wish to clarify the relevancy of our contention to this claim. Had not the extra work been incorporated in our contract, we would have completed our job in the fall of 1937, ahead of schedule, therefore having no need for an extension of time as a result of conditions existing during the winter of 1936–37. However, with the addition of this extra work, we were left at the beginning of this winter season with 15% of the contract to complete, necessitating the asking of additional time as a result of aforementioned causes.
>
> * * * * *
>
> Furthermore, inasmuch as the Employment Office was unable to furnish enough men during the summer months when conditions were at their best, we feel that we were justified in pushing our operations during that season rather than experience a complete shut-down as a result of labor shortage during the winter. In addition, we wish to state that the reduction of men was not through any action of ours. The reduction was caused rather by the individuals themselves who, not being able to obtain sufficient work on this project as compared with that available elsewhere in the vicinity, asked us to release them. This condition of lack of sufficient work for the men was brought about by the fact that during November we were not permitted to pour concrete unless the ambient atmospheric temperature was at least 20° F. and rising. Therefore, not being able to obtain men from the National Reemployment Office on one hand, and our men leaving the job on the other, we were approaching the time when further operations would have been impossible.

22. Defendant's District Engineer wrote plaintiff December 1, 1937, as follows:

> I have to inform you that your progress in the construction of Lock and Dam No. 9, Allegheny River is unsatisfactory.
>
> The work is some months behind schedule and it is apparent that it will not be completed within the time set therefor by the contract as modified by Change Orders 1 to 15, inclusive. The time now set for completion of the contract is December 7, 1937, with probable extension of a few days under Change Order No. 5, depending upon the quantity of additional rock excavation that may be required under that change order.
>
> Report has been received that you are preparing to suspend operations during the winter. It is urged that you continue the work to completion without unnecessary delay.
>
> Your attention is invited to Article 9 of the contract and Paragraph 1–03 of the specifications which require payment by you to the Government as liquidated damages the sum of $300.00 for each calendar day of delay after the date set for completion of the contract until the work is completed and accepted, excepting for delays due to unforeseeable causes beyond the control and without the fault or negligence of the contractor. In this connection it is to be noted that ordinary winter weather is not an excusable cause of delay under the contract.

23. Plaintiff also closed down its work for the winter period of 1937–38 and on March 3, 1938, requested an extension of contract time to cover this period. Plaintiff set forth the condition of the weather during the period and stated:

> Furthermore, 15% of the present contract which remains to be completed is approximately equal in amount to the additional work added to the original contract. We feel that had not this additional work been incorporated in our contract we would have completed this project during 1937. On the other hand, the time remaining on the contract on November 25, 1937, when we were forced to shut down, was sufficient to enable us to complete the now remaining work had it occured at the outset of a season of the year when practical operations are possible and warranted.

We hereby request, therefore, an extension of time for the portion of this season beginning on November 25, 1937, and extending to the 1st of March 1938, such request being further subject to change depending on future conditions.

When the work was closed down for the winter period 1937–38 there remained approximately $312,045.00 of work yet to be performed under the contract.

Defendant under date of April 7, 1938, made findings of fact regarding plaintiff's request and concluded:

a. The contractor shut down operations during the winter of 1937–38 voluntarily and on his own initiative; the shut-down was not approved by this office; and it was not necessitated by any unforeseeable conditions.

b. The contractor failed to notify me in writing of the causes of delay within 10 days from the beginning thereof.

c. The winter of 1937–38 was an average one for the locality involved.

24. May 16, 1938, the District Engineer advised plaintiff in writing:

By letter of May 10, 1938, I advised you that, since an appeal to the Chief of Engineers had not been taken by you on your claim No. 2 within 30 days, as allowed by article 9 of the contract, my decision as contained in my findings of April 7, 1938, would be final and conclusive on the parties to the contract. This ruling applies also to your claim No. 1, my decision on which was contained in my findings of February 5, 1938.

If you feel that the above does not constitute a just disposition of the matter and wish to submit an appeal, the appeal will be forwarded to the Chief of Engineers for such action as he deems proper. Unless an appeal is submitted, no independent decision on the above claims will be rendered by the Chief of Engineers. Appeals should be adressed as follows: * * *

On May 13, 1938, plaintiff appealed to the Chief of Engineers as to both the winter periods.

25. On April 27, 1938, plaintiff wrote to the contracting officer, in connection with Change Order No. 16, dated December 31, 1937 (see finding No. 17), as follows:

Your office, on December 31, 1937, issued to us Change Order No. 16 granting us 87 days' extension of time on account of delays in completing our work due to the insufficient supply of qualified labor from the offices designated by the United States Employment Service on our contract No. ER–W1101eng.–3, dated August 5, 1935, for constructing Lock and Dam No. 9, Allegheny River and Alterations to Dam No. 8, Allegheny River.

Had this labor been furnished to us by the designated labor agency (or our request granted to hire labor from other sources) during the period from July to October 1937, the work on our contract would have been entirely completed, with the possible exception of the ten openings left in the dam for by-passing the water. Even with this amount of work to be completed on November 25, 1937, our company would have made every human effort to complete the work rather than carry it over until the spring of this year. Closing of openings does not necessitate the ideal conditions required to seal off the caissons, due to the fact that floating equipment used in this stage of the construction is less affected by fluctuations in the level of the river. However, if the work on the ten openings could not have been completed during the winter of 1937–38, certainly this portion of remaining operations could have been started by April 1st of this year.

Solely due to a great deficiency in the supply of laborers and mechanics as previously stated, our operations were impeded and delayed to the extent that we did not get six caissons completed and sunk before we were driven out of the river on account of high water—leaving the most important work of sinking and sealing of these six caissons, which are in the main flow of the river and which require considerably lower water to commence work than we have had up to this writing. Furthermore, it would not have been necessary for our company to carry our organization throughout the winter of 1937–38 if all work had been completed except the ten openings.

Therefore, in view of the fact that the 87 days' delay was incurred during the most favorable working season of the year, we feel that it is only fair that this extension of time be applied at a period when the conditions are comparable to those in which the delay took place: namely, the coming months of 1938.

On May 19, 1938, the defendant in replying to plaintiff's letter of April 27, 1938, stated in part as follows:

5. I have investigated the conditions as set forth in your letter, and my findings of facts are as follows:

a. That Change Order No. 16, dated December 31, 1937, granted you an 87-day extension in time for the period from March 17, 1937 to October 23, 1937, because of delays occasioned by the inability of the office designated by the United States Employment Service to furnish a sufficient supply of qualified labor.

b. That a careful review of the progress records reveals that, had it not been for the above-mentioned 87 days of delay, you could probably have completed your entire contract, with the possible exception of concreting the bypass openings, by the end of November 1937.

c. That the closing down of operations on November 25, 1937, was not due to any action or requirement of the Government. Had you constructed a cofferdam, as contemplated by paragraph 2–01 (a) (2) of the specifications, and continued work after November 25, 1937, you would, in my opinion, have had no material difficulty in completing the work within the contract time, i. e. by March 19, 1938.

d. That your contract allowed 450 calendar days for the completion of the work, and all extensions thereto have been made on the basis of calendar days. It is obviously impossible to arrange the time so that extensions can always be applied at periods when conditions are comparable to the periods in which the delays take place. Prior to the issuance of Change Order No. 16, the date set for the completion of the contract was December 22, 1937. Change Order No. 16, allowing for delays occurring during the spring, summer, and fall of 1937, extended the completion date of the contract to March 19, 1938. Obviously, the time extension in this case was applied during a season somewhat less favorable for operations than the season during which the delays occurred. However, if reference is made to Change Order No. 3, which also granted an extension in contract time, under Article 9 of the contract, it will be noted that, while most of this delay occurred during one of the most severe winters on record, the 125-day extension of time therefor, was applied to the period March 23, 1937 to July 26, 1937, or during a very favorable working season. Extensions of time under Article 9 of your contract seem to indicate an equitable distribution between favorable and less favorable construction seasons.

> *e.* That the present date set for the completion of your contract is March 19, 1938, anticipating 15 days' additional time yet to be granted for work under Change Order No. 5. This date has been determined by giving due extensions of time for all changes, extra work and delays occasioned under the contract to date. I have no authority to extend further your contract time.
>
> 6. Should you not agree with these findings of fact you have the right to appeal under Article 9 of your contract. Your attention is specifically invited to the fact that your appeal must be made within 30 days in order to receive consideration. Appeals should be addressed as follows: * * *

Correspondence was carried on between the parties, during which plaintiff's claim was denied and reconsidered.

26. After all of the work on the contract had been substantially completed, plaintiff on September 27, 1938, claimed that it was delayed 49.47 days due to insufficient supply of qualified labor in 1938. On October 3, 1938, the contracting officer made findings that plaintiff had been delayed 18 days from said cause, and advised plaintiff that if it did not agree with the finding, appeal should be made to the Chief of Engineers, and at the same time plaintiff was presented with a change order (No. 18) extending the time for 18 days. Plaintiff signed this change order in the following language:

> The foregoing modification of said contract is hereby accepted, subject, however, to the specific proviso that such acceptance shall not limit or restrict to any extent or in any manner the right of the contractor to make or prosecute any claim or claims whatsoever under the aforesaid contract, nor does the contractor surrender any of its rights under said contract.

27. On October 3, 1938, the defendant issued Change Order No. 19, concerning the rental of a derrick boat. This change order was accepted by plaintiff in the same language as the proviso set forth above, relating to Change Order No. 18.

28. On November 15 and 16, 1938, a conference was held in the office of Colonel Covell who was District Engineer and Construction Officer, plaintiff's counsel, Mr. Robert P. Smith, the plaintiff, and some of the defendant's engineers in order that plaintiff might secure moneys which were still due it

under the contract, and at the same time sign Change Orders Nos. 18 and 19 under protest. At that time plaintiff's counsel exhibited a letter from plaintiff to the District Engineer reading as follows, except for the concurrence by the District Engineer at the bottom thereof:

NOVEMBER 16, 1938.

Lt. Col. W. E. R. COVELL,
United States Engineers Office,
Federal Building, Pittsburgh, Penna.
REF: No. ER–W1101eng.-3
Dated August 5, 1935.

SIR: There are enclosed herewith Change Orders Nos. 18 and 19 properly signed by us.

It is our understanding that in signing all of Change Orders Nos. 1 to 19 inclusive the contractor has not surrendered any rights under the contract and the acceptance of the change orders covers only the subject matter contained therein and does not limit or restrict to any extent the right of the contractor to make or prosecute any claim whatsoever under the aforesaid contract.

We understand that this is in accordance with your viewpoint as stated at our conference in your office on November 15, 1938, and we would appreciate your confirmation of this.

Respectfully,
YORK ENGINEERING & CONSTRUCTION CO.,
By [s.] S. W. HARBOLD.
Concurred in:
[s.] W. E. R. COVELL,
Lt. Col., Corps of Engineers,
District Engineer.

The District Engineer requested his resident engineer, Mr. Winn, in the presence of plaintiff's representatives and their attorney to determine whether or not in signing the letter he would in any way reopen any change orders or claims that had been previously decided, and whether or not he would be stepping outside of the contract provisions. Upon being advised in plaintiff's presence that the signing of the letter would not reopen any change orders or any matters upon the contract that had been decided previously, the District Engineer signed his concurrence in said letter.

29. On November 16, 1938, plaintiff filed its itemized claim alleging breach of contract covering items of unnecessary expenditures, overhead, together with claim for remission of liquidated damages in the sum of $400,000. The qualified acceptance of change order No. 18 (finding 26) and the filing of claim November 16, 1938, advised defendant for the first time that plaintiff would claim damages or excess costs.

The Chief of Engineers considered plaintiff's claim, forwarded the same to the General Accounting Office under date of July 29, 1939, recommended denial of various items except liquidated damages, and in connection with the item of liquidated damages stated:

> 5. *Liquidated damages*—The contractor's claim for remission of liquidated damages is based upon two contentions. (1) that it was delayed due to unusually severe weather conditions; and (2) that it was delayed in the prosecution of its work due to inability to secure qualified labor from the relief rolls.
>
> With reference to (1), the contractor has not presented any evidence showing wherein the ruling of the Acting Chief of Engineers dated August 2, 1938, copy inclosed, is in error.
>
> With reference to (2), certain additional information has been presented relative to said delay which has hitherto not been considered by me. The District Engineer reports that, during the periods December 8, 1936, to March 31, 1937, and November 25, 1937, to June 1, 1938, a total of 202 days, or 290 calendar days beyond the original completion date, the contractor had closed its operations. The District Engineer further advises that, in his opinion, the reason for not completing the contract work within the prescribed time was due (*a*) to its failure to build an adequate cofferdam as provided for in the contract, and (*b*) to its resultant inability to work during winter weather.
>
> The contract provided for the erection of a cofferdam, or other approved means to facilitate the elimination of the river water, and enable the construction of the dam. The contractor elected, with the approval of the contracting officer, to use caissons for this purpose. Under the local conditions, the cofferdam method would have been more adaptable to winter operations. However, it is my opinion that the contractor had a right to use any elected method of construction, provided it

was in accord with good engineering principles, and would insure timely completion of the work. There is no evidence of record to indicate that the caisson method of construction would be unsatisfactory in these respects. It is the contractor's contention that the time allowance for any excusable cause of delay should take into consideration the elected method of accomplishing the work, in the instant case, allow for the winter shutdown periods.

I am in accord with the contractor's views in this respect, and consider that an equitable adjustment of time due to delays from authorized causes, or needed to effect necessary changes, would be an extension equal to the amount of time by which the completion date of the contract is delayed by such causes rather than an extension equal to the exact period of delay. In this connection the record discloses that the contractor's work was extended, for allowable causes and for changes authorized under Article 3 of the contract, beyond the original contract completion time through two winters. During these two winters the contractor suspended work after the original completion date for a total of 290 calendar days. As the extension of time granted under the various change orders did not take this factor into consideration, it is my opinion that the contractor is entitled to an additional allowance of time equivalent thereto. The total period for which liquidated damages were assessed is 189 days, which would entitle the contractor to a remission of all of them.

In the consideration of this claim, attention is invited to the fact that all of the change orders, with the exception of the last two, were accepted without protest by the contractor. However, the nature of the conditions incident to the work were such that the contractor could not foresee the loss of time due to the winter shutdown periods when the respective change orders were issued, and thus be in a position to register a protest. The following factors contributed to these conditions: (1) in some of the extra-work change orders the actual time allowance was indeterminate when issued, as said time was dependent upon the amount of material removed; (2) it was not possible to attribute the advancement of the work into the winter season to any particular change order—it was the effect of all of them; and (3) it was not known in advance for how long, if at all, it would be necessary to suspend work due to unfavorable winter conditions. For the foregoing reasons, I consider the contractor's protests on

the last two change orders to be within the time limit provided in Articles 9 and 15 of the contract. In view of the above enumerated conditions, the action taken by the Acting Chief of Engineers in his letter of March 27, 1939, copy herewith, upon the contractor's appeal of June 17, 1938, was not based upon a complete knowledge of all of the circumstances and, for that reason, should not be considered in conflict with the recommendation herewith.

In accordance with the above, it is my recommendation that all liquidated damages assessed against the contractor be remitted.

30. Plaintiff suffered delays in carrying on its work under the instant contract in 1935, 1936, 1937, and 1938 by reason of NRS failing to supply to the project a sufficient number of workmen. To December 31, 1937, under the method of calculation used by both plaintiff and defendant in making calculations in regard to the assessment of liquidated damages, this delay amounted to 131 days for which the defendant granted change orders Nos. 3, 9, and 16. As stated in finding 12, this method of calculation was erroneous, and attributed more days' delay to shortages of labor than a correct method would have done. Plaintiff accepted these change orders and did not protest or appeal from them in writing, as required by Article 9 of the contract. (See finding 17.)

Plaintiff suffered material delays which were not attributable to lack of available labor. The number of days of these delays is not determinable from the evidence. Plaintiff's failure to complete the project by November 1937 was the result of the combined operations of the delays due to shortages of labor and to other causes.

The evidence does not show that plaintiff would have completed its work on the entire project by November 2, 1937, even if it had had an adequate supply of labor. With such a supply, plaintiff probably would have completed the work about June 15, 1938.

31. Of plaintiff's sixteen causes of action set forth in the petition, all except those designated "Second," "Third," "Twelfth," and "Fourteenth" seek to recover damages arising out of a claimed breach of contract on the part of de-

fendant in failing to supply sufficient qualified labor in accordance with the terms of the contract. They will now be taken up and considered.

First Cause of Action

32. The specifications provided in part as follows:

> 1-14. *Damage.*—Damage to Government property, due to failure of the contractor to take reasonable precaution to prevent same, and all loss or deterioration of or damage to the permanent work by flood, accident, or exposure, other than as specified in paragraph 1-06 hereof, prior to final acceptance shall be made good by the contractor without expense to the United States. The contractor will also be held responsible for any damage done to adjoining property through his neglect or failure to properly protect the work and river banks.

Plaintiff and defendant agreed that in lieu of keys, copper strips would be placed in construction joints. Plaintiff placed the copper strips, and also protective timbers.

During the spring of 1938 these copper strips and protective timbers were damaged by flood. Plaintiff was required to replace these strips at a cost of $306.63. Plaintiff claims that had there been a sufficient supply of qualified labor all of the work would have been completed before the damage was done and it would not, therefore, have had to replace the copper strips. From the denial of the contracting officer of this claim, plaintiff took an appeal to the Chief of Engineers, who also denied it.

Second Cause of Action

33. The specifications provided as follows:

> 5-14 (*e*). *Construction joints.*—Vertical joints shall be formed with tongue-and-groove bonds or keys at such locations and of such shapes and dimensions as approved or directed by the contracting officer. Horizontal joints shall be formed with keys, or, where horizontal pressure is always in one direction, with steps. Where required, dowel rods shall be used. All concrete in vertical members shall have been in place not less than 12 hours, and longer if so directed by the contracting officer, before concrete in horizontal members resting

thereon is placed. Before placing is resumed all excessive water and laitance shall be removed and the concrete shall be cut away, where necessary, to insure a strong dense concrete at the joint. Where necessary to secure adequate bond, the surface of existing concrete shall be cleaned and roughened and shall then be spread with a ½-inch layer of mortar of the same cement-sand ratio as is used in the concrete, immediately before the new concrete is deposited. Where specified or otherwise required by the contracting officer for water-tight construction, copper strips of the width shown on the drawings and weighing not less than 20 ounces per square foot, properly crimped or bent, shall be placed in the concrete to span the joint.

Plaintiff was required to place a layer of cement and sand mortar not exceeding ½ inch in thickness on all horizontal construction joint surfaces before placing new concrete thereon in accordance with the above paragraph of the specifications. On June 19, 1936, plaintiff protested the requirement relying on its interpretation of the specifications which required the use of mortar only "where necessary." Reply to plaintiff's protest was made by letter of June 23, 1936, in which it was stated that mortar would be required on all horizontal construction joints since this was necessary to secure adequate bond. Plaintiff did not protest this decision until October 4, 1938. Plaintiff's protest was denied by the contracting officer by letter of October 12, 1938. Plaintiff appealed this decision to the Chief of Engineers on December 7, 1938. The Chief of Engineers after stating that plaintiff had not made timely protest found that the work was within the scope of the contract and that additional payment therefor was not due. It is not shown that the requirement of the district engineer was unreasonable under the conditions existing on this project.

Plaintiff's net increase in cost due to the use of mortar on horizontal construction joints was $2,100.

Third Cause of Action

34. Plaintiff is claiming compensation of $2,159.09 for being required to place material of cork and tar paper in certain construction joints not indicated in the plans or

specifications. Except for a few controlling points the location of monolith joints in the lock and abutment were not indicated on the contract plans. Paragraph 5-14 (d) (4) of the specifications provided that the lay-out of all monoliths would be as directed or approved by the contracting officer before concreting commenced. By paragraph 5-21 the specifications provided that expansion joints would be constructed at such joints as indicated or required. Actually only one expansion joint was indicated on the lock and abutment, it being located at station 11-95 of the abutment. This involved about 100 square feet of expansion joint material. The defendant contends that its engineers required that expansion joints be installed at other locations and of certain dimensions in accordance with provisions of paragraph 5-21 of the specifications.

On October 11, 1935, plaintiff wrote to the District Engineer, saying that it would require several thousand lineal feet of 3/8-inch premolded cork in construction of lock No. 9, Allegheny River, and planned to buy it from the Armstrong Cork Company, Pittsburgh, Pennsylvania, and asked if inspection of the material was necessary before it would be approved and could be shipped.

Under the direction of the defendant's enginer on the project plaintiff continued placing these expansion joints until the work involving expansion joints was completed in 1937. Plaintiff made no protest against so doing until October 4, 1938. On October 28, 1938, the contracting officer made findings of fact stating that the use of expansion material in the monolith joints of navigation lock and navigation dam and abutment is standard construction practice, and that prospective bidders could readily have determined the extent to which the requirements of the specifications would be made to apply. Plaintiff appealed from the decision of the contracting officer to the Chief of Engineers, who affirmed the contracting officer's decision. The placing of the expansion joint material as required by the Government's agents was reasonably necessary.

Fourth Cause of Action

35. Plaintiff spent $3,660.86 more than it would have spent for electrical power if the contract had been completed November 2, 1937. There is no evidence as to the proportional amount that would have been spent from June 15, 1938 to October 6, 1938 or any other portion of that year.

Fifth Cause of Action

36. Plaintiff expended for workmen's compensation insurance in 1938 increased costs of $5,221.47 over what it would have paid on the same payroll in 1937. The proof is insufficient to show what the amount of the increase was on the wages paid from June 15 to October 6, 1938.

Sixth Cause of Action

37. Plaintiff paid $882.06 in unemployment and social security taxes in 1938 which it would not have had to pay for performing the same work in 1937. The proof does not show what the amount of the increase was on the wages paid for the period June 15 to October 6, 1938. The amount claimed in this cause of action is also included in the twelfth cause of action.

Seventh Cause of Action

38. Plaintiff paid to the Maryland Casualty Company additional premium on its completion bond amounting to $1,761.23, based on the value of uncompleted work as of November 2, 1937, approximately 15% of the entire contract amount. Plaintiff would not have been required to pay that amount if it had completed the work by November 2, 1937.

Eighth Cause of Action

39. Plaintiff spent $31,483.93 to repair damage caused by cold weather, floods and ice during the winter of 1937–1938.

Ninth Cause of Action

40. Plaintiff claims that it is entitled to recover the reasonable value of the services of its two copartners from November 2, 1937 to October 1, 1938. Their services were reasonably worth $1,000 per month, each.

Tenth Cause of Action

41. Plaintiff spent in the operation of its plant subsequent to November 2, 1937, on the contract here involved, the sum of $36,572.38, including the cost of machine operators. The evidence does not show what amount was spent after June 15, 1938. There is no proof that plaintiff had other contracts upon which its equipment could have been placed during 1938. This item is also included in the Fifteenth cause of action.

Eleventh Cause of Action

42. Plaintiff spent $55,221.76 for material, maintenance, and overhead charges after November 2, 1937, which amount was exclusive of salaries for partners and exclusive of charges that would have been necessary had the work been completed prior to November 2, 1937. The amount so expended for the period of June 15 to October 6, 1938, is not proved.

Twelfth Cause of Action

43. Plaintiff paid Federal and State of Pennsylvania social security taxes and unemployment insurance amounting to $13,144.16 as a result of legislation enacted subsequent to the date of the contract. Plaintiff on January 7, 1937, requested payment for the amount due up to that date, which was refused by the defendant. The amount of $882.06 described in the sixth cause of action is included in this cause of action.

Plaintiff appealed to the Chief of Engineers from the action of the contracting officer in disallowing the social security tax claim, and the Chief of Engineers sustained the disallowance.

Thirteenth Cause of Action

44. During the year 1938 plaintiff spent $18,668.86 in obtaining gravel for concrete. Prior to the year 1938 plaintiff had rented equipment from the Allegheny River Sand Corporation for the production of its required gravel. The gravel was used as produced with no additional amount store up for anticipated future use, because plaintiff had no space to store gravel. There was no insufficiency of labor in the production of gravel. In 1938 the equipment plaintiff had rented for the purpose was no longer available and plaintiff purchased gravel for use during 1938 from J. K. Davis & Brothers of Pittsburgh. It is not proved that plaintiff could have produced the quantity of gravel needed for the entire operation at no additional cost over the costs prior to November 1938. Nor is there proof that the defendant was at fault in failure to provide storage place for anticipated aggregate.

Fourteenth Cause of Action

45. Between September 19, 1937, and November 27, 1938, plaintiff paid wages to common labor on its project in the total sum of $4,264.58 in excess of the minimum wage scale provided in the contract, being an increase in wages from 45¢ to 60¢ per hour. Plaintiff's reason was that the WPA projects at Kittanning and in the vicinity of Lock and Dam No. 9, had increased the wages of its common laborers from 35¢ to 50¢ per hour, and that in a conference with representatives of defendant plaintiff had been given assurance that an increase in its wage scale, to be paid for by the Government, would be recommended. Plaintiff's laborers were leaving the project and plaintiff experienced difficulty in holding men to carry on the work.

October 28, 1937, plaintiff wrote the contracting officer asking for reimbursement for its increase in wages and was advised that a telegraphic request for permission to issue a change order providing for an upward revision in wage scale to conform to rates established for other governmental construction projects in the vicinity of Lock and

Dam No. 9 had been denied by the Chief of Engineers. The District Engineer therefore denied plaintiff's request. Plaintiff, under date of November 10, 1937, wrote the District Engineer protesting the decision, and advising that it would file a claim for the additional wages paid. Plaintiff appealed from this decision to the Chief of Engineers, who denied the claim as being unallowable under Article 18 of the Contract.

Fifteenth Cause of Action

46. Plaintiff claims that the rental value of its equipment for the period of 149 days during which, according to change orders 3, 5, 9, 16, and 18, the plaintiff was delayed by the lack of qualified labor is $168,036.24. The fair rental value for idle plant owned by plaintiff, for 149 days, is $25,826.66, or $173.33 per day.

Sixteenth Cause of Action

47. Plaintiff alleges that because of breaches of the contract by defendant the reasonable cost of construction plus a reasonable profit was $2,542,439.45, and that plaintiff had been paid $2,080,305.19, and that the balance of $462,134.26 should be paid plaintiff as an alternative claim. On defendant's objection plaintiff was not permitted to offer evidence in support of this claim.

The court decided that the plaintiff was entitled to recover $4,264.58, plus the amount of workmen's compensation paid by the plaintiff because of the increase in wages of $4,264.58.

Entry of judgment was suspended to await the filing of a stipulation by the parties showing the correct amount of the judgment.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a partnership, entered into a contract in August of 1935 to build for the United States Lock and Dam No. 9 in the Allegheny River in Pennsylvania. The work was done in the autumn of 1935, and in the open seasons of 1936, 1937, and 1938. It was completed on or about October 6, 1938. The plaintiff was paid the agreed

price for the work. It sues here for damages for several alleged breaches of contract by the United States. It sets forth in its petition sixteen separate causes of action. All but 4 of them are for damages which, the plaintiff asserts, resulted from one breach of the contract, viz, the Government's failure to furnish the plaintiff a supply of labor to adequately man the work and carry it forward to completion. The plaintiff asserts that this failure prevented the plaintiff from completing the work before the winter of 1937–1938, which it would have done if it had had an adequate supply of labor, and that several of the items of its claim resulted from its having to carry the work over that winter and through the following summer.

The alleged duty on the part of the Government to supply the plaintiff with labor is said to flow from the following provision of the contract:

> ART. 19. (a) *Labor preferences.*—With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2, (a) such persons shall be referred for assignment to such work by the United States Employment Service, and (b) preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least ninety per centum (90%) of the persons employed on any project shall have been taken from the public relief rolls: *Provided, however,* That, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service. * * *

The plaintiff's interpretation of this provision of the contract is given in its reply brief as follows:

> We submit that under Article 19 of the contract the defendant undertook the responsibility of supplying plaintiff with sufficient workers to properly staff the job.

We think that this interpretation is not the correct one. The primary purpose of most of the public works financed by the Government during this period was to relieve unemployment. In order that the jobs created with public money for this purpose should go to those who were in such distress

as to be eligible for the relief rolls, it was necessary that the Government keep a careful check on the roll of employees. Its method of doing so was to require that all employees except those in supervisory, administrative and highly skilled jobs, be referred to the employer by the United States Employment Service. In that way the requirement that 90% of the persons employed should be obtained from the public relief rolls, unless the Works Progress Administration should otherwise authorize, could be enforced.

We think, therefore, that Article 19 was a promise by the plaintiff not to employ labor except as therein provided. We think it also, by implication, contained a promise by the Government to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff. For example, we think that the Government would have breached this implied term of the contract if its Works Progress Administration had not, when there were not enough men on the relief rolls to fill the plaintiff's needs, authorized the United States Employment Service to refer men to the plaintiff who were not on the relief rolls. But there was no such failure, as such authorizations were given with reasonable promptness when the need for them arose, many of them in the first months of the work, and remained in effect for the duration of the work.

The relevant facts concerning the plaintiff's shortage of labor seem to be about as follows. In the summer of 1935, when the plaintiff was about to bid on the work, it inquired in the locality and found that there was a large labor surplus, with many workmen on relief. It therefore assumed and counted on an adequate supply of labor, since it needed only some 600 men. When it began its work, however, it found almost immediately that some classes of labor, such as crane operators, pile drivers and, a few weeks later, form carpenters could not be obtained from the relief rolls. It requested permission to hire nonrelief workmen for these trades, and the Works Progress Administration authorized the Employment Service to send nonrelief men. The Gov-

ernment also authorized the plaintiff to work the men that it could get a much longer work week than was permitted by the contract without special authorization. Nevertheless, almost from the beginning, the plaintiff did not get enough workmen. Working conditions were not attractive, the work having to be done in water. The principal employment in the area before the depression had been coal mining, and that industry revived, giving employment to many men at higher wages and with more agreeable working conditions than the plaintiff's job offered. The site of the dam was in a rural area, so that there was no great number of workmen living within easy distance. Public transportation was not available, from most directions. The cost of meals and lodging was high, in comparison with the potential earnings, at least of common laborers. The plaintiff did not establish a work camp at the job, so that workmen would have had to find lodging places for themselves, many of them at inconvenient distances from the job. The Government was carrying on, in the area, projects such as the construction of sewers which were of public importance, and which probably competed with the plaintiff's project in the sense that if they had been closed down, some of the workmen on them might have been diverted to the plaintiff's job. The plaintiff's requisitions for men, sent to the employment service, prescribed qualifications in the way of experience and equipment not likely to be met by many persons living in the area of the work.

The Government was responsible for practically none of the factors listed above, which prevented the plaintiff from getting enough men. It may be that it could have, by the closing down of relief work projects in adjacent areas compelled men to take jobs with the plaintiff and board away from home, though the net wages available to support their families would have been small. We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract.

The plaintiff contends that the Government should have cancelled the requirement of Article 19 (a) that the plaintiff

should employ only those referred to it by the United States Employment Service. We have indicated above the reason for this requirement. After the Employment Service had been authorized to refer men not on relief, it did so, and permitted the plaintiff to select persons whom it wanted, and send them to register at the Employment Service so that they might be referred to the plaintiff for employment. In that way the plaintiff could get men if it could find them, but the Employment Service would have a record of who they were, where they came from, etc., which might be useful if the relief problem again became acute. The plaintiff contends that if it could have hired men "off the street" at the site, instead of having to send them to register at the Employment Service, it could have obtained enough help. We think this has not been proved. We do not see why a workman, desirous of working for the plaintiff, would be substantially deterred from doing so by being required to register at the Employment Office. It could have been, if it was not, explained to him that he was not asking for relief; that there was no difference between the public employment office and a private employment agency except that the former charged no commission. We think it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract. The plaintiff had a shortage of labor because there were not enough men, at the place and time, who wanted to work for the plaintiff. So it cannot recover, unless the Government guaranteed to put enough men into the plaintiff's employ and keep them there, to man the job adequately, or pay the plaintiff damages if there should be a shortage, however unavoidable. As we have said, we do not so interpret Article 19 (a). We do not read into that language the implication that the Government will pay damages as for breach of contract if an unavoidable shortage of labor occurs, to the contractor's detriment.

The plaintiff urges that it is entitled to recover under the doctrine laid down by this court in the case of *Young-Fehlhaber Pile Company* v. *United States*, 90 C. Cls. 4. We think not. In that case the Government, though it could not supply the contractor with labor, "in effect declined to consider"

his proposition that he be allowed to use his own men, but "told him to go along with what he had." 90 C. Cls. 7. As we have said above, we think such conduct on the part of the Government was a breach of its implied contract that the plaintiff should be permitted to get on with his work with reasonable economy if the contemplated source of labor, i. e., relief roll labor, should prove inadequate.

But there was no such breach of the implied contract in the instant case. Exemptions were granted early in the course of performance of the contract, and remained in effect for the duration of the contract, which made it possible for the plaintiff to hire any available workmen merely by having them register at the United States Employment Service. As we have said, it has not been proved that this requirement had any material bearing upon the plaintiff's labor shortage.

We have stated above that the qualifications written into the plaintiff's requests for labor were so strict that they may have contributed to the plaintiff's shortage. It is difficult to reconcile the language of these requisitions with the plaintiff's claim of an acute and damaging shortage of labor. In August 1938, in the fourth season of the shortage, the plaintiff stipulated, for the 15 carpenters requested, "previous experience on dam construction necessary." How, out of this area, it expected to get carpenters with such experience, is hard to understand. In July 1938 it requested 150 laborers and said, "Must report for work supplied with hip boots." One of the plaintiff's executives testified that in fact the plaintiff bought the hip boots wholesale at a low price and his testimony may mean that they were supplied to the workmen without charge. This being so, the plaintiff was negligent to its own damage, since it may have, by this and other requisitions such as are quoted in finding 15, which stipulated qualifications which it did not in fact intend to insist upon, aggravated its shortage of labor. To whatever extent it did so, the Government was relieved of responsibility even if Article 19 (a) could be read, as the plaintiff urges, as a promise by the Government to furnish sufficient labor. Such a promise would not mean that it was bound to furnish labor having unusual qualifications not reasonably to be expected to be available.

Even if we construed Article 19 (a) of the contract as the plaintiff urges, we do not think that the plaintiff has proved that the labor shortage was the cause of the work's being carried over the winter of 1937–38. The plaintiff relies strongly upon the computation made by the Engineer's Office, in extending the time for the completion of the contract and excusing the plaintiff from the payment of liquidated damages for late completion. By that computation, the plaintiff was said to have been delayed 131 days during the years 1935, 1936, and 1937 because of insufficient labor. By subtracting that number of days from the number of days which, the plaintiff alleges, it used in 1938 to complete the work, the plaintiff says that it shows that the work would have been completed in the fall of 1937.

The determination by the Engineer's Office of the extent of the delay caused by shortages of labor is, of course, not binding here. It made that determination for the purpose of performing its function, provided in the contract, of determining whether liquidated damages for late completion should be assessed or excused. For its purposes, an unavoidable shortage of labor would have been just as good a reason for waiving liquidated damages as a shortage resulting from the fault of the Government or its breach of contract. It did not purport to decide that the Government had breached its contract and was liable in damages for that breach.

The computation of the number of days' delay caused by labor shortages was palpably wrong, since it was based on a mathematically erroneous formula. The method used was to tabulate (1) the number of men requisitioned for labor of various classes, (2) the number of men reporting on time, (3) the number of men at work before the new men were due to report, and (4) the total number of men needed for the work. The percentage of deficiency was then determined by subtracting item (3) from item (4) and dividing the difference by item 4. This formula gave the percentage of deficiency before any of the men requisitioned had reported, but disregarded the number of men who did report. It therefore produced a ratio of deficiency substantially higher than the true ratio, and gave the plaintiff a correspondingly higher number of days of excusable delay.

Since, as we have said, the computation is not determinative here, and since it was erroneous, it does not help us to decide whether the plaintiff would have completed the work in 1937 if it had had a sufficient supply of labor.

A witness for the Government presented a recomputation, based upon a formula which eliminated the error in the former one, and which showed that 103 days' time was lost in the years 1935, 1936, and 1937 because of shortages of labor. If this computation is approximately correct, the plaintiff would have had a considerable amount of work to do in 1938, even if it had had sufficient labor in the earlier seasons, and would not have completed the work until about June 15, 1938.

As to many items of its claim, the only evidence presented by the plaintiff as to the amounts of its alleged damages is computations based upon its contention that it would have, but for the shortage of labor, completed the work on November 2, 1937. Even if we were of the opinion that the insufficiency of the labor supply was a breach of contract by the Government, we would not have evidence as to the amount of damage resulting from it, for the period from June 15, 1938, to the completion of the work.

The plaintiff's sixteen causes of action will now be discussed. The first, covered in finding 32, is for the cost of replacing copper strips destroyed by a spring flood in 1938. Since, as we have found, the Government did not by breach of contract cause the work to be carried over into 1938, the plaintiff was bound by its contract to replace any work damaged by flood prior to completion of the contract. Its doing so was not, therefore, extra work, and it is not entitled to extra pay for it.

In its second cause of action, detailed in finding 33, the plaintiff complains that it was required to spread a layer of mortar on the concrete already placed, whenever it poured additional concrete on top of it. The specifications said "Where necessary to secure adequate bond, the surface of existing concrete shall be cleaned and roughened and shall then be spread with a ½-inch layer of mortar * * * before the new concrete is deposited." The plaintiff was required to spread mortar on all horizontal concrete surfaces,

and complains that this was not "necessary to secure adequate bond." The plaintiff protested the requirement on June 19, 1936, and was advised by letter that the requirement would be insisted upon. The plaintiff again protested on October 4, 1938, but the protest was denied by the Contracting Officer and, on appeal, by the Chief of Engineers. Questions of engineering, such as this, were lodged with these officials by the contract, and it is not shown that their decision was not a reasonable one.

In its third cause of action the plaintiff complains that it was required to place cork and tar paper in many joints not required by the contract. The specifications provided that expansion joints of cork and tar paper would be made "as indicated or required." Only one was "indicated" specifically on the drawings of the lock and abutment. The reason for this was that the size of the concrete monoliths to be poured was not specified, but was left to the contractor and the Government officials to determine as the work proceeded. As it did proceed, expansion joints were required between all monoliths. The plaintiff seems to have contemplated this requirement, as shown in finding 34. We think the requirement was reasonable, and that the decision of the Contracting Officer and the Chief of Engineers imposing the requirement should not be disturbed.

The fourth, fifth, sixth, and seventh causes of action are for costs of electric power, workmen's compensation insurance, unemployment and social security taxes, and surety bond premiums, which were greater because the work was carried over into 1938. See findings 35, 36, 37, 38. As to the first three items, the rates were higher in 1938 than in 1937. The surety bond would have expired if the work had been completed in 1937, and no premium would have accrued in 1938.

As we have said, the shortage of labor which, the plaintiff claims, caused the work to be carried over into 1938 was not a breach of the contract by the Government. Its consequences cannot therefore, be recovered from the Government. Also, as we have said above, we do not have the evidence from which to determine what these increased costs would have been from June 15, 1938, the approximate date

when the contract would have been completed but for the labor shortage, to the date of completion.

The eighth cause of action is for the cost of repairing damages to the work caused by cold weather, floods, and ice during the winter of 1937–1938 (Finding 39). The ninth is for the reasonable value for the period of the alleged delay due to labor shortages of the services of the two partners who make up the plaintiff's partnership and who devoted their time to this contract throughout its performance (Finding 40). Since we have found that the Government is not responsible for the delay, these causes of action cannot be sustained.

The tenth and eleventh causes of action are for the cost of upkeep and operation of its plant, and for material, maintenance and overhead charges incurred by it after November 2, 1937, and up to the completion of its work in 1938. Some of these costs resulted from whatever delay was caused by shortages of labor, but we have held that the Government was not answerable for the delay.

The twelfth cause of action is for all social security taxes paid to the State of Pennsylvania and the Federal Government on account of the contract work during the several years of its performance (Finding 43). The theory of the claim is that the law imposing these taxes was enacted after the contract was entered into. We think the Government does not, in its contracts, agree to pay any new or increased taxes of general application imposed by a state or by itself. Compare *United States* v. *Standard Rice Co.*, 323 U. S. 106 (decided December 4, 1944), affirming 101 C. Cls. 85.

The thirteenth cause of action is for the alleged increased cost of procuring gravel in 1938 over what its cost would have been in 1937 (Finding 44). From what we have said it follows that the plaintiff could not recover this cost, even if the fact and the amount of the increase had been proved. The fifteenth cause of action is for the rental value of the plaintiff's machinery for the alleged period of delay (Finding 46). This claim is foreclosed by what has been said above. The sixteenth cause of action is alternative to all the others, and claims the difference between what it actually cost it to do the work, plus a reasonable profit, and what it

has been paid (Finding 47). Since the Government did not, we have concluded, breach its contract, this claim is not valid.

The fourteenth cause of action is for the cost of a raise of fifteen cents in the hourly wages of the plaintiff's common labor. It had been paying 45 cents up to September 19, 1937, when it raised the hourly wage to 60 cents. The contract required the plaintiff to pay not less than 45 cents for common labor. The WPA had other projects in the vicinity of the work, and had been paying 35 cents an hour, but raised its wages to 50 cents. The plaintiff found it difficult to hold workmen on its work. It consulted the Government's representatives and was assured that an increase in its minimum wage would be recommended. If an increase had been directed by the Government, the contract price would have, by the terms of the contract, been increased to cover it. The Contracting Officer requested permission from the Chief of Engineers to order the increase, but permission was denied.

The plaintiff urges that the Government, by its action in raising the wages of WPA laborers in the vicinity from 35 cents to 50 cents, made it necessary for the plaintiff to raise its wages, in order to hold its workmen. We think that, in the circumstances, the Government's action in raising WPA wages made it impossible or difficult for the plaintiff to secure labor at 45 cents an hour. If so, it was a violation of the term which we found in *Beuttas* v. *United States*, 101 C. Cls. 748, to be implied in all contracts, i. e., that, subject to exceptions not here necessary to define, one party to the contract will not so act as to increase the cost of performance by the other. In the instant case, the contract itself provided that the minimum wage rates set in the contract were subject to change by the contracting officer, and that the contract price should be adjusted to compensate for any change he made. We think it was fairly implied in the contract that if the Government should do something which made it impracticable for the contractor to obtain labor at the minimum wage set in the contract, the power to increase that minimum, and compensate the contractor for the increase would be used. That it was necessary for

the plaintiff to raise its wages five cents to meet the new WPA wage of fifty cents, seems clear. The plaintiff claims that it was necessary to raise its wages fifteen cents, to sixty cents an hour, thus preserving the former differential of ten cents, in order to get needed labor. Though the proof of this necessity is not very satisfactory, we think that, in the circumstances, it was necessary, since the plaintiff's work was not attractive or desirable, in comparison with other jobs, and since the plaintiff had not been able in the past to get an adequate supply of labor, even by paying the ten cent differential. We therefore allow recovery of $4,264.58. Whatever additional workmen's compensation costs were incurred as a result of this increase in wages may also be recovered. The court will suspend entry of judgment to await a stipulation of the parties as to the additional workmen's compensation costs.

The plaintiff is entitled to recover $4,264.58 plus the costs of workmen's compensation attributable to that amount of wages.

It is so ordered.

WHITAKER, *Judge*, and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting in part:

I am of opinion that defendant did not breach the wage provisions of its contract with plaintiff and that plaintiff is not, therefore, entitled to recover the amount of $4,264.58 which the court has allowed. *LeVeque et al.* v. *United States*, 96 C. Cls. 250, and dissenting opinion in *Beuttas et al.* v. *United States*, 101 C. Cls. 748.

JONES, *Judge*, took no part in the decision of this case.

Upon a stipulation by the parties showing that in accordance with the court's opinion "the amount of Workmen's Compensation paid by the plaintiff because of the increase in wages of $4,204.58 is the sum of $405.30," and upon plaintiff's motion for judgment, it was ordered October 1, 1945,

that in addition to the sum of $4,264.58 above stated the plaintiff was entitled to recover the sum of $405.30, or a total of $4,669.88.

ON PLAINTIFF'S MOTION FOR NEW TRIAL

Mr. Robert P. Smith for the plaintiff. *Mr. William Ristig* was on the briefs.

Mr. W. A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case comes before the court on plaintiff's motion for a new trial, and on consideration thereof:

IT IS ORDERED this 4th day of June 1945 that said motion be and the same is overruled.

MADDEN, *Judge;* LITTLETON, *Judge*, and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

I think the motion for a new trial in this case should be granted.

The parties agree that the defendant was delayed because there was an insufficient supply of labor; the defendant granted plaintiff an extension of time of 149 days on this account; and the proof convinces me that there was an adequate supply of relief labor on the rolls available for reference to this job. It was not referred to it because the Works Progress Administration refused to furnish to the United States Employment Service the names of men then on relief for referral to this job since the job was in a remote section of the county and transportation facilities were meager and expensive, and the amount a laborer could earn on the job was small. However, the project was established for the benefit of the people in this community on relief in order to take them off of relief and provide employment for them on this project. From this I think there arose an implied agreement on the part of the defendant to furnish plaintiff with relief labor to the extent that such labor was available to it.

If it later developed that it did work an undue hardship on these laborers to refer them to the job then this provision of the contract should have been waived.

It is true that the Works Progress Administration did exempt plaintiff from the requirement of securing certain of its labor from the relief rolls, but this exemption proved inadequate; plaintiff still was unable to get an adequate supply of labor. In this situation and with relief labor in hand adequate to have supplied plaintiff's needs, the obligation was on the defendant either to do all it could do to furnish this relief labor or to waive this article of the contract altogether and permit plaintiff to get its labor where it could. It did neither and as a result thereof the plaintiff was damaged. Plaintiff was entirely without fault, so far as I can see, and in my opinion it is entitled to recover the damage that it has suffered as a result of the defendant's breach of its implied obligation.

JONES, *Judge*, took no part in the decision of this case.

STANDARD FRUIT AND STEAMSHIP COMPANY v. THE UNITED STATES

[No. 45267. Decided March 5, 1945. Plaintiff's and defendant's motions for new trial overruled June 4, 1945]

On the Proofs

Foreign mails; carrying of "Convention mails" by ships registered under flag of Honduras, from December 1, 1932, to March 28, 1942; agreement by Honduras to pay.—Where the plaintiff, a Delaware corporation, engaged in operating ships registered under the flag of Honduras, from ports in the United States to ports in Carribbean and Central American countries, including Honduras, during the period from December 1, 1932, to March 28, 1942, carried foreign mail delivered to its agents by United States postmasters at New York, New Orleans and Galveston and the United States Postal Agent at Havana, Cuba, in accordance with the postal laws and regulations of the United States; and where beginning with December 1, 1932, the United States refused to pay plaintiff for the carriage of "Convention mails", claiming it was not liable therefor under the terms of Article 3, of the conventions between the Americas and Spain (47 Stat. 1925; 50 Stat. 1657); and where plaintiffs,

after such refusal, continued to carry the mails; it is *held* that plaintiff is not entitled to recover from the defendant for the carriage of Convention mails between April 16, 1937, and March 1942, the period covered by the instant claim.

Same; provisions of Postal Conventions are part of postal laws and regulations of the United States.—The provisions of the Postal Convention of 1931 between Spain and the United States of America and the Central and South American Countries, including Honduras, signed at Madrid November 10, 1931, and approved by the President February 9, 1932 (47 Stat. 1924), and the provisions of the later Convention of 1937 (50 Stat. 1657), relating to the carrying of foreign mail, are part of the postal laws and regulations of the United States (U. S. Code, Title 5, Section 372), and have the same force and effect as any other regulation issued by the Postmaster General under authority of law. 33 Op. A. G. 276, 278; *Four Packages of Cut Diamonds* v. *The United States*, 256 Fed. 305.

Same; requirement under statutes to carry "Convention mails" does not imply agreement by United States to pay therefor in view of defendant's refusal.—There was no implied agreement on the part of the defendant to pay for the carrying of "Convention mails" by the plaintiff after December 1, 1932, although under the statutes plaintiff was required to carry such mail upon demand of the United States postal authorities, since on said date defendant had notified plaintiff it denied liability for its carrying.

Same; defendant not entitled to recover on counterclaim for amounts paid to plaintiff prior to December 1, 1932.—Where from April 1919 to the last of November 1932 defendant paid plaintiff various amounts for mail carried from ports of the United States to Honduras and other countries in the West Indies and Central America; and where subsequent to November 1932 defendant paid other sums for mails carried by plaintiff's vessels to places other than Honduras; it is *held* that defendant is not entitled to recover such sums on its counterclaim on the basis that under a contract, March 12, 1919, between plaintiff's predecessor and the Republic of Honduras, plaintiff's predecessor had agreed "to carry and forward free of charge from and to the United States of America" all such mail matter delivered to said predecessor by the proper authorities, to which contract the United States was not a party and which was not made for the benefit of the United States.

Same; the United States may not recover under terms of contract to which it was not a party, and which was not made for its benefit.—The contract of March 12, 1919, between plaintiff's predecessor and the Republic of Honduras, was not entered into for the benefit of the United States, which was not a party thereto, and the United States cannot maintain an action

on it. *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220; *Robins Dry Dock & Repair Co.* v. *Flint, et al.*, 275 U. S. 303.

The Reporter's statement of the case:

Mr. William I. Denning for plaintiff. *Messrs. John W. Cross* and *Earl C. Walck* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Lt. Thomas F. McGovern* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, Standard Fruit and Steamship Company, at all times during the period referred to in the petition was and still is a corporation organized and existing under the laws of the State of Delaware, and during such time it was engaged in operating steamships registered under the flag of the Republic of Honduras from ports in the United States to ports in Cuba, Jamaica, Panama, Canal Zone, Nicaragua, Honduras and Mexico.

2. During the period from December 1, 1932, to March 28, 1942, the postmasters at New York, New Orleans and Galveston, and the United States Postal Agent at Havana, Cuba, tendered mails to plaintiff for transportation on said vessels to Havana, Cuba; Kingston, Jamaica; Cristobal, Canal Zone; Puerto Cabezas, Nicaragua; La Ceiba, Honduras; and to Vera Cruz, Tampico and Alvaro Obregon, Mexico. The mails transported were classed by the Post Office Department as letter mails, prints, registered or "red label" mails, and parcel post. Some of the mails of these classifications were of United States origin and other mails of these classifications were foreign transit mails, i. e., foreign closed mails moving through domestic ports in the United States to foreign ports at which plaintiff's steamers were expected to call.

3. On or about the first of each month plaintiff received from the postmaster at New York a blank form to be filled out and returned by the fifth of the month, showing dates of sailing, sailing days, names of steamers, ports of call and destination, sailing hours, and the registry of steamers for

the succeeding month. There was printed on the form the following:

> This information is desired for transmission to the Postmaster General, in order that he may determine the steamships which will be assigned to carry the United States mails during the period mentioned.

This form was duly filled out with the information requested and returned to the postmaster. Plaintiff thereafter received a further form from the postmaster, usually a day or two prior to actual sailing of the steamer, on which form plaintiff furnished the name of the steamer, the registry, time of sailing, the pier from which it would sail, and the names of the ports of call, also the speed of the steamer. It was provided on the form that in the event of change in departure of steamers immediate notice must be given the post office. The second form contained the following notice:

> Mails for dispatch by outgoing steamships shall be delivered by the post office at the time agreed upon to the respective steamship companies, who must convey them to their steamships.
>
> It is understood that the mails shall be carried in accordance with the terms, conditions, and responsibilities prescribed by the Postal Laws and Regulations of the United States (or in accordance with the terms of the contract covering the service, where there is such a contract.)
>
> Each truck (or wagon) conveying mail from the post office to the steamship will be provided with a man to ride on the rear so as to prevent interference with the mail or the possibility of a sack working loose and falling, unobserved, into the street.

This form was fully filled out, signed by plaintiff's representative and returned to the post office. Information similar to that called for by these forms was furnished the postmasters at other ports of sailing.

4. There was published and issued monthly to the public by the Post Office Department, Second Assistant Postmaster General, Division of International Postal Service, a "Schedule of Steamships Carrying Mails from the United States

and United States Mails from Havana, Cuba, to Foreign Countries, also to the Territory of Hawaii and to Possessions of the United States."

Under the caption "Mails for Central and South America, West Indies, etc." the schedule listed, among others, certain of plaintiff's steamers sailing from the port of New York to Kingston, Jamaica, and La Ceiba, Honduras; from the port of New Orleans, (1) via Havana, Cristobal, Puerto Cabezos (Nicaragua), to La Ceiba, Honduras; (2) direct to ports in Honduras; and (3) direct to Tampico and Vera Cruz, Mexico; and from Havana direct to Cristobal. The sailing date, approximate days in transit, closing time for mails at the post office were shown and under the caption of "probable mails to be conveyed" there was shown the class of mails i. e. whether letters, prints, or parcel post or all of such classes, as well as country of or port of destination of the mails.

5. The mails tendered by the post office at New Orleans were accompanied by a post office waybill in quadruplicate showing number of sacks of registered or "red label" mails listed according to post office of origin, i. e., from New Orleans, Nuevo Laredo, Yokohama, Hongkong, Shanghai, etc., and cities and countries of destination. Mails other than registered or "red label," were shown simply as so many sacks of letters and papers (prints); and so many sacks of parcel post without reference to name of a post office or country of origin or port or country of destination. The waybill of the New Orleans post office contains the following notation at the bottom:

> To be made in quadruplicate. One copy to be retained by the postmaster, one by the officer of the steamer, and two copies handed to the postmaster at port of delivery, one of which to be receipted and returned to postmaster, New Orleans, La.

At New York, Galveston and Miami (for connection at Havana) different forms were used, but the information as to mails dispatched was similar to that contained on the form used at New Orleans.

The waybill used at the Miami post office to accompany mails intended for plaintiff's vessels at Havana destined to Cristobal contains the following notation:

> This waybill is issued in five copies. One copy to be retained by the Commander of the vessel after receipt for the mails has been obtained thereon from the postal service at port of debarkation; one copy to be furnished to the U. S. Postal Agent at Havana; one to the Havana post office; two copies to be handed over with the mails at office of destination (Cristobal), one of which, after acknowledgement, is to be returned to the Postmaster at port of dispatch (Miami or Tampa).

The mails covered by the Miami waybills were dispatched to Havana on steamers other than plaintiff's, and at Havana they were delivered to plaintiff's steamer which had left New Orleans two days before en route to Cristobal, and also carrying mails tendered at New Orleans. The steamship officer obtained a receipt for the mails from the post office official at port of destination and the receipt was returned to the postmaster at point of dispatch from the United States.

6. As required by postal regulations, plaintiff received the mails tendered by the postmasters through its truckmen, who called at the post office platform; the truckman receipted for the mails and transported them to the shipside; mails were guarded by a man on the tail gate of the truck as required and then delivered to the proper officer of the steamer who receipted for them on the post office waybill accompanying the mails. Mails were tendered plaintiff's steamers at shipside in the port of Havana by the U. S. Postal Agent, such mails having been transported to shipside by the Havana post office.

7. The weights of the mails of the respective classes are taken by the postmaster at point of dispatch, but statements of such weights were not furnished to plaintiff at New Orleans and New York until a few days after sailing; for the mails received at Havana the weight statements were received about the 15th of the month covering the previous month's delivery. The weight statements from the postmasters show countries of destination for United States mails

and Foreign Closed Transit Mails separated as to letters, prints, and parcel post. Country of origin of foreign closed transit mails is not shown on weight statements.

No distinction was indicated on post office waybills as to mails (i. e., letters and prints) to or from countries signatory to the Convention of the Americas and Spain (referred to in Finding 9) and when plaintiff called for the mails at the post office there was no indication as to which mails were so-called "Convention" mails. Some of the so-called foreign transit mails were received in the United States post office in what is called "open" mail (i. e., they are not included in the foreign transit "closed mails"), and even though such mails originated in a foreign country they are included when dispatched by post offices in the United States in sacks containing mails of United States origin and the post office records do not separately show the weight of such mails.

The weight statements show the weights of all mails transported without reference to the particular number of sacks shown on post office waybills, and plaintiff was unable to reconcile weights with classes of mails other than parcel post, there being no segregation of weights of registered or "red label" by classes nor is there any segregation of weights of letters and prints contained in sacks containing both letters and prints. All sacks are sealed by the post office against inspection. The weights reported do not include the weights of sacks.

8. Section 2254 of the Postal Laws and Regulations (edition effective October 1, 1932, to October 31, 1940), as certified to the Court by the Postmaster General and insofar as pertinent herein, reads as follows:

> 2254. All letters or other mailable matter conveyed * * * from any part of the United States by any foreign vessels, * * * shall * * * be taken from the United States post office when departing, * * * and for refusing or failing to do so, * * * the party offending shall be fined not more than one thousand dollars. (Section 4016 of Revised Statutes; 18 U. S. C. A. 326.)
>
> 2. Steamship companies shall be answerable to the United States for the safety of the mail intrusted to

them, and accountable for any loss or damage resulting to any of such mail by reason of failure on the part of any of their officers, agents, or employees to exercise due care in the custody, handling, or transportation thereof. The registered (red label) sacks shall be specially protected during transfers and on board vessels. In case of delinquencies, fines may be imposed or deductions made from the company's pay. Mails for dispatch by outgoing steamers shall be delivered from the post office, and steamship companies shall haul the sacks to the steamers. Each truck (or wagon) shall be provided with a man to ride on the rear and protect the mail. The red-label sack shall be separately delivered to the steamship company's representative at the post office; sacks and seals shall be carefully examined at time of receipt; and when a rack (open) truck is used the sacks shall be covered by a tarpaulin, Unless special arrangements are made, mails shall be ready for delivery at the post office in time, designated by the postmaster, to connect with the conveying steamer.

After October 31, 1940, the applicable Postal Laws and Regulations read as follows:

2251. All letters or other mailable matter conveyed * * * from any part of the United States by any foreign vessel * * * shall * * * be taken from the United States post office when departing, * * * and for refusing or failing to do so, * * * the party offending shall be fined not more than one thousand dollars (Section 4016 of Revised Statutes; 18 U. S. C. A. 326).

2. Mails for dispatch by outgoing steamers shall be delivered from the post office and steamship companies shall haul the sacks to the steamers. Each truck (or wagon) shall be provided with a man to ride on the rear and protect the mail. The red-label sacks shall be separately delivered to the steamship company's representative at the post office; sacks and seals shall be carefully examined at time of receipt; and when a rack (open) truck is used the sacks shall be covered by a tarpaulin. The registered (red label) sacks shall be specially protected during transfers and on board vessels. Unless special arrangements are made, mails shall be ready for delivery at the post office in time, designated by the postmaster, to connect with the conveying steamer.

2254. The Postmaster General may impose or remit fines on contractors or carriers transporting the mails by air or water on routes extending beyond the borders of the United States for any unreasonable or unnecessary delay to such mails and for other delinquencies in the transportation of the mails (39 U. S. C. A. 655).

2. Steamship companies shall be answerable to the United States for the safety of the mail intrusted to them, and accountable for any loss or damage resulting to any of such mail by reason of failure on the part of any of their officers, agents, or employees to exercise due care in the custody, handling, or transportation thereof. In the case of delinquencies, fines may be imposed or deductions made from the company's pay.

9. Plaintiff regularly received compensation from the Post Office Department for all mails transported until December 1, 1932, when payments for mails other than parcel post and a small amount of foreign closed mails were stopped, on the ground that Article 3 of the "free transit" provisions of the Postal Convention of the Americas and Spain concluded in Madrid in November 1931, effective March 1, 1932, was applicable to the subject transportation.

10. Articles 3, 5 and 18 of this Convention (47 Stat. 1925, 1926, 1932) read as follows:

ARTICLE 3. *Free and gratuitous transit.*

1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter may send to any destination.

2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches.

ARTICLE 5. *Articles of correspondence.*

The provisions of this Convention shall apply to letters, single and reply post cards, prints of all kinds, commercial papers, samples without value, small packets and insured articles. Nevertheless, the services of small packets and insured articles are limited to the

countries which agree to execute them, either in their reciprocal relations or in one direction only.

ARTICLE 18. *International Office of the Postal Union of the Americas and Spain.*

1. With the name of International Office of the Postal Union of the Americas and Spain, there will function in Montevideo, under the supervision of the Administration of Posts, Telegraphs and Telephones of the Republic of Uruguay, a Central Office which will serve as an organ of liaison, information and consultation for the countries of this Union.

2. This Office will be charged with:

(a) Assembling, coordinating, publishing and distributing information of all kinds which specially concerns the Americo-Spanish postal service.

(b) Giving, at the express request of the parties concerned, its opinion on disputed questions.

(c) Giving, on its own initiative or at the request of any of the signatory countries, its opinion on all matters of a postal character which affect or relate to the general interest of the Postal Union of the Americas and Spain.

(d) Making known the requests for modification of the Acts of the Congress which may be formulated, and giving notice of the changes which may be adopted.

* * * * *

11. The classes of mail for which plaintiff's claim is asserted are letters, prints, and foreign transit mails. All of such classes of mail are covered by the Spanish-American Convention. The Spanish-American Convention does not cover parcel post. The vessels involved in the action belong to plaintiff company, registered under the laws of the Government of Honduras and flying the Honduran flag.

12. The Director of the International Office wrote to the Director General of Posts and Telegraphs of Honduras under date of August 28, 1936, in part as follows:

> My Office has received from the Post Office Department in Washington copies of extensive correspondence exchanged with your administration relative to the application of the provisions of Art. 3 of the Convention of Madrid relative to gratuity of transit, the last of which communications is dated at Tegucigalpa July 7, last, and bears the number 5736.
>
> Having carefully studied that correspondence and the arguments advanced by both Postal Administrations, the undersigned has reached the conclusion that

> the right is on the side of the Post Office Department of the U. S. A.; inasmuch as, in conformity with the provisions above cited, ships of the registry of nations belonging to our Union and flying their flag must carry free of charge the correspondence originating in the other countries of the said Union.
>
> That principal, admitted and accepted without exception by the whole of the America-Spanish nations, has also been expressly recognized by Honduras on account of certain difficulties which have arisen between the International Transfer Office of Panama and the steamship companies of Honduran registry during the year 1933.

Under date of September 8, 1936, the Director General of Posts of Honduras replied to the letter of August 28, 1936, from the Director of the International Office, as follows:

> Upon taking note of the contents of your said communication, my Office submitted to the Secretariat of State of "Fomento," Agriculture and Labor (to which this Administration is subordinate) the complete text of your opinion on the controversy which arose between the United States Post Office Department and the Honduran Administration concerning the application of the provisions of Art. 3 of the Madrid Convention relative to free transit, the interpretation of which this service had made conscientiously, using as the basis the fact that the steamship companies which carry mails from or for Honduras, or mails of countries of the Universal Postal Union, had received from my Government, in addition to permission to fly the flag of this country, exemption from the charges and imposts prescribed by law for ships entering or leaving Honduran ports; consequently, this Office believed that the said companies were obliged to perform such service gratuitously and hence the defense made by this Administration in order to avoid payment of the amount charged, which avoidance was not attempted systematically, but because we harbored the belief that the complaining companies were obligated morally, above all, to perform the service gratuitously, as a small recompense for the incalculable favors which this country had granted them. This, then, is the reason why my service defended itself in good faith, expecting reciprocity on the part of companies favored by the Government of Honduras, which did not even have the good judgment to submit their claims to my Administration,

as you will have seen from my note No. 5736 of July 7 last to the Post Office Department in Washington, the principal part of which reads as follows: "The claimants should appear before my Office with their request, accompanied by the evidence in the case, and not seek to have authorities foreign to the Honduran Post Office settle their cases for them, since this Office is the one which should settle its own transactions."

In view of the strong feelings regarding the incident, my Office advised the Ministry, by note of the first instant, that, "in order to avoid future complications with the steamship companies, and consequently the intervention of the Post Office Department in Washington, this Administration is of the opinion that, if the Honduran Office pays the amount charged, that the permission to fly the Honduran flag granted them should be canceled; or efforts should be made to oblige the said companies to transport mails gratuitously in exchange for the many favors granted them by the Government of Honduras; because, in truth, as can be seen from the note which I am quoting to you today, the International Office of the Americo-Spanish Postal Union pronounces itself in favor of the American Administration, and is therefore of the opinion that the Honduran Administration should pay the steamship companies which have complained to the Post Office Department in Washington, as you can see from the note mentioned."

The Minister of "Fomento," Agriculture and Labor, replied to this service on the 3rd instant as follows: "that the Executive Power will take the necessary steps to settle the debt referred to and try to come to an agreement with the steamship companies" for the transportation of the mails involved in the dispute by application of the Madrid Convention.

It is decided, then, that the Government will pay the unsuspected debt to the steamship companies flying the Honduran flag, which only receive benefits from the State, and in the present case never gave any intimation in the matter to my Office; and, as my Office is the proper one to know of all matters concerning the Honduran postal service, it is to be hoped that the companies referred to will appear before the proper authorities with the respective evidence and make their claims.

13. November 18, 1936, the United States Post Office Department wrote to the Director General of Posts of Honduras, asking to be advised concerning the procedure neces-

sary to assure the compensation of the steamship companies for the services in question, not only for that already performed but for the services to be performed in the future.

14. The United States Post Office Department and the Honduran Department of Posts had continuing accounts against each other arising out of the handling and delivery of parcel post mail after such mail had reached the United States and Honduras, respectively. At the time of the transaction in question there was a considerable balance due by the U. S. Post Office Department to the Honduran Department of Posts for said service.

15. Considerable correspondence ensued between the United States Post Office Department and the Honduran Department of Posts relative to the method and procedure for settlement of the claims. As a result of this correspondence the Acting Director, Division of International Postal Service, Bureau of the Second Assistant Postmaster General, U. S. Post Office Department, delivered, on May 16, 1938, to plaintiff U. S. Treasury warrant dated April 22, 1938, drawn on the Treasurer of the United States by the Postmaster General and the Comptroller General, in the sum of $14,194.24, in favor of the Director General of Posts of the Republic of Honduras, and endorsed by the payee to plaintiff, for which plaintiff delivered to the said Acting Director, Division of International Postal Service, its release for claims for all mails transported on sailings between ports named during the period December 1, 1932, to October 6, 1934, as set forth in the statement of account contained in the letter of May 9, 1938. That statement is as follows:

Standard Fruit & Steamship Company:

New Orleans to Cuba, Panama, etc.: December 1, 1932, to October 3, 1934	$7,792.96
Havana to Cristobal: May 27, 1933, to October 6, 1934	6,026.80
Cristobal to New Orleans (U. S. Fleet Mails): April and May 1934	$322.61
New York to Cuba: October 1933	.14
New York to Jamaica: June 1934	19.27
New Orleans to Vera Cruz: January 1, 1934, to Oct. 5, 1934	8.87
	$14,180.45

Plaintiff received no further payment and brought this action for compensation claimed due after October 16, 1934, to January 10, 1940, in the sum of $88,770.26. Subsequent to the date plaintiff's action was filed, the United States Post Office Department paid to plaintiff a further sum, represented by U. S. Treasury warrant dated September 1, 1940, payable to the Minister of Fomento, Agriculture and Labor of the Republic of Honduras in the sum of $28,574.50, and by that official endorsed over to plaintiff.

This payment covered mails transported during the period October 6, 1934, to April 16, 1937. This left a balance claimed by plaintiff of $58,848.55. The settlement warrant of $28,574.50 covered service performed by plaintiff as follows:

New Orleans to Cuba, Panama, etc., October 4, 1934, to February 10, 1937	$12,859.65
Havana to Cristobal, October 7, 1934, to February 6, 1937	15,552.03
New Orleans to Vera Cruz, October 6, 1934 to April 16, 1937	18.20
Galveston and New Orleans to Alvaro, Obregon, March 12, 1935, to April 12, 1937	78.86
	28,508.74
	[1] 65.76
	28,574.50

[1] $65.76 applied on sailing of February 17, 1937, from New Orleans to Cuba, leaving balance of $20.55 on said sailing.

16. On August 7, 1933, the Post Office Department wrote plaintiff a letter, the first paragraph of which reads as follows:

> I have to refer to previous correspondence relative to your inquiry concerning the failure to receive compensation for the conveyance of certain mails from ports of this country to foreign countries and have now to inform you as follows:

The letter then discussed the liability of the United States and of the Republic of Honduras for the charges for the carriage of the mails between ports of the United States and ports of countries signatory to the Postal Convention between the Americas and Spain, and in the last paragraph concluded:

Under the circumstances, no obligation rests upon this Department for services rendered by your company in in the transportation of the mails in question by a steamship of the registry of one of these countries sailing from a United States port, such obligation having been assumed by the country whose flag the steamship flies through the approval by the government of such country of the Convention containing the free transit provision cited above. Your claim should therefore be properly submitted to the postal administration of the country concerned for consideration.

17. Plaintiff by permission of this court amended its petition and brought its claim down to March 1942, in the sum of $39,145.77, or a total of $97,994.32.

Plaintiff's claim as set forth in its original petition for mails of the United States of foreign origin tendered by the postmasters at New York, New Orleans, and Galveston, and by the United States postal agent at Havana, Cuba, and transported to ports of Honduras, Mexico, Nicaragua and Cristobal, did not include weights and compensation for mails dispatched to Honduras on sailings from New Orleans via Cuba, Panama and Nicaragua to Honduras, and did not include weights and compensation for mails dispatched to Honduras on sailings from New York via Panama to Honduras. Plaintiff had failed to include these weights and claimed compensation in its original claim submitted to the Post Office Department.

18. Plaintiff's claim is shown in detail as follows:

(Original Petition)

New Orleans to Cuba, Panama, Nicaragua and Honduras:		
Fiscal Year 1935 (from Oct. 10, 1934)	$3,499.00	
Fiscal Year 1936	5,302.52	
Fiscal Year 1937	6,597.17	
Fiscal Year 1938	7,790.98	
Fiscal Year 1939	10,025.40	
Fiscal Year 1940 (to Jan. 10, 1940)	4,511.08	
		$37,726.15
Via Havana to Cristobal:		
Fiscal Year 1935 (from Oct. 13, 1934)	2,740.31	
Fiscal Year 1936	6,036.50	
Fiscal Year 1937	9,945.23	
Fiscal Year 1938	10,572.94	

Via Havana to Cristobal—Continued.		
Fiscal Year 1939	$11,864.35	
Fiscal Year 1940 (to Jan. 8, 1940)	5,527.57	
		$46,686.90
New York to Jamaica:		
Fiscal Year 1936 (from Sept. 5, 1935)	6.18	
Fiscal Year 1938	346.40	
Fiscal Year 1939	1,668.66	
Fiscal Year 1940 (to Jan. 6, 1940)	1,290.17	
		3,311.41
New Orleans to Vera Cruz and Tampico:		
Fiscal Year 1935 (from Oct. 12, 1934)	6.63	
Fiscal Year 1936	8.05	
Fiscal Year 1937	5.57	
Fiscal Year 1938	8.63	
Fiscal Year 1939	8.42	
Fiscal Year 1940 (to Jan. 5, 1940)	4.24	
		41.54
Galveston and New Orleans to Alvaro Obregon:		
Fiscal Year 1935 (from March 12, 1935)	19.15	
Fiscal Year 1936	41.32	
Fiscal Year 1937	35.32	
Fiscal Year 1938	107.64	
Fiscal Year 1939 (to March 16, 1939)	34.25	
		237.68
Total		[3] 88,003.68
Less:		
Partial payment included in warrant #895,745 dated April 22, 1938, endorsed in favor of company by the Republic of Honduras, applied against sailing of S. S. *Contessa* from New Orleans, October 10, 1934 and release signed therefor by company May 16, 1938	$13.79	
Amount paid by warrant #518,012 dated September 31, 1940 endorsed in favor of company of Republic of Honduras and release signed therefor by company Oct. 21, 1940	28,574.50	
		28,588.29
		58,848.55

[3] Defendant's Exhibit F showed the amount of $88,003.68, which upon recheck indicated that some mail destined to Honduras had been included. The amount should be reduced to $87,436.84.

19. Plaintiff's total claim is itemized as follows:

Balance from original petition			$58,848.55
New Orleans to Cuba, Panama, and Nicaragua:			
Fiscal year 1940 (from Jan. 17, 1940)	$1,301.98		
Fiscal year 1941	5,499.10		
Fiscal year 1942 (to March 28, 1942)	13,889.51		
		$20,690.59	
Via Havana to Cristobal:			
Fiscal year 1940 (from Jan. 13, 1940)	5,763.29		
Fiscal year 1941	9,302.74		
Fiscal year 1942 (to Feb. 11, 1942)	43.09		
		15,109.12	
New York to Jamaica:			
Fiscal year 1940 (from Jan. 13, 1940)	880.32		
Fiscal year 1941	1,275.52		
Fiscal year 1942 (to March 26, 1942)	1,146.78		
		3,302.62	
New Orleans to Vera Cruz and Tampico:			
Fiscal year 1940 (from Jan. 12, 1940)	$4.03		
Fiscal year 1941	14.84		
Fiscal year 1942 (to April 17, 1942)	24.57		
		43.44	
			39,145.77
Total			97,994.32

(Covering mails destined to Honduras as claimed in amended petition)

New Orleans to Honduras:		
Fiscal year 1937 (from Feb. 24, 1937)	$126.33	
Fiscal year 1938	338.80	
Fiscal year 1939	362.11	
Fiscal year 1940	360.85	
Fiscal year 1941	338.59	
Fiscal year 1942 (to March 28, 1942)	460.67	
		$1,987.35

Total brought forward			$97, 994. 32
New York to Honduras:			
Fiscal year 1935 (from October 6, 1934)	$474. 25		
Fiscal year 1936	359. 23		
Fiscal year 1937	327. 71		
Fiscal year 1938	298. 31		
Fiscal year 1939	367. 93		
Fiscal year 1940	353. 43		
Fiscal year 1941	355. 08		
Fiscal year 1942 (to February 7, 1942)	236. 81		
		$2, 772. 75	
Total of mails to Honduras			4, 760. 10
Amount claimed by plaintiff			102, 754. 42

COUNTERCLAIM

20. Plaintiff was incorporated in 1924 under the laws of the State of Delaware and has since continued as a corporation under the laws of that state. (Finding No. 1.) At the time of incorporation it succeeded to the interest of Vaccaro Bros. and Company, a corporation which was organized in New Orleans about 1900 for the operation of a steamship line and for the importation of bananas and other tropical fruits from countries of Central America.

21. On on about March 12, 1919, Vaccaro Bros. and Company contracted with the Republic of Honduras for a concession giving it the right to build a railroad, obtain and develop public lands, and for other purposes. At the time the concession was granted, and continuing until 1924, when plaintiff company became the successor of Vacarro Bros. and Company, the steamship line operated by Vaccaro Bros. and Company ran exclusively between New Orleans, Louisiana, and La Ceiba, Honduras.

Articles 5 and 23 of the Concession, insofar as pertinent herein, provided as follows:

> 5. The Concessionaire obligates himself to carry gratis, to and from the United States, all the mail delivered to him by the respective Postal Offices and addressed to the ports touched by his ships, whether these are owned or chartered by him * * *

> 23. * * * Any question or difficulty arising between the contracting parties during the term of this contract shall be solved by two arbitrators, named one by each of the parties thereto, who in case of a disagreement shall name a third, and if they should fail to come to an understanding with regard to this nomination, it shall be made by the First Judge of Letters of the Civil Court of this department. The tribunal shall be organized in this capital, shall proceed in conformity with the laws of the Republic and shall give its award within four months after it is installed, and against it there shall be no recourse whatever. In no case may the Concessionaire appeal to diplomatic channels for the settlement of difficulties arising from this contract and its amendments.

The original is written in the Spanish language and the foreogoing is plaintiff's translation thereof. The translation of the defendant as to the first paragraph is slightly different and reads as follows:

> The concessionaire undertakes to carry and forward free of charge from and to the United States of America, all mail matters which may be delivered to him by the proper post offices, addressed to ports which his steamers shall touch, regardless of the fact whether such steamers are his own or chartered. The steamers owned by the concessionaire and those chartered by him as well as the freight carried by the enterprise * * * shall be exempt from lighthouse duties, tonnage dues, anchorage or from any other port assessments * * *.

22. When the Concession was granted in March 1919, Vacarro Bros. operated 3 vessels, viz., *Ceiba*, *Yoro*, and *Tegucigalpa*, all of which were of Honduran flag, the operation being exclusively between New Orleans and La Ceiba, Honduras. In 1924, when plaintiff succeeded Vacarro Bros., plaintiff continued to operate between New Orleans and La Ceiba, and at this latter date had added to its fleet the *Morazan* of Honduran registry, also one vessel of Norwegian registry and three vessels of Nicaraguan registry. Plaintiff also branched out at that time with a separate line of steamers from New Orleans to Mexican ports; also a separate service from Galveston to Mexican ports. At about the same time a further service was inaugurated direct from

New Orleans to San Blas, Panama. About 1924 plaintiff also inaugurated a separate service from New York to Jamaica; during the same year another service was started from New Orleans to Havana, thence to La Ceiba, Honduras.

About 1928 plaintiff also inaugurated a separate service from New Orleans to Havana, and to Puerto Cabezas, Nicaragua, still continuing a direct service from New Orleans to La Ceiba. About 1928 or 1929, the itinerary out of New Orleans was changed to go via Havana, Canal Zone, Puerto Cabezas, Nicaragua to La Ceiba, Honduras, the other services being maintained practically the same. Those services were continued until about June 1, 1942, including the service from New York to Jamaica. The New York-Jamaica service started in 1924, subsequently included Santiago, Cuba, as a port of call, the New York-Santiago-Jamaica being one service.

During the period of plaintiff's operation, as successor to Vacarro, plaintiff operated at various times 6 to 13 vessels of Honduran, 7 Norwegian, 4 British, 5 Nicaraguan, and 4 United States flag vessels. The Honduran vessels were either owned by plaintiff, or owned by the Standard Navigation Corporation, a Delaware corporation, a wholly-owned subsidiary of plaintiff. The vessels under Nicaraguan registry were owned by a subsidiary of plaintiff, and time chartered to plaintiff; Norwegian vessels were chartered by plaintiff from a Norwegian Company; British flag vessels were owned by a subsidiary of plaintiff, and were operated under time charter by plaintiff.

23. During the period from April 1919 to March 1942, inclusive, postmasters at United States post offices tendered to Vacarro Bros. and Company and plaintiff, as successor in interest, mails classified as letters, prints, registered or "red label," and parcel post, for transportation on vessels of the various flags of registry, in the same manner and under the same conditions as such mails were tendered and transported on plaintiff's vessels of Honduran registry as set forth in findings 2 to 7, inclusive. Said mails of the several classifications were of United States origin, as well as foreign transit closed mails of the same classes. Plaintiff and its predecessor in interest, Vacarro Bros. and Company, were paid com-

pensation for such transportation by the Post Office Department on a poundage basis at rates fixed by the Postmaster General and the amounts of such payments for all of such mails other than parcel post were as follows:

UNITED STATES MAILS

	Letters	Prints	Total
From April 1919 to March 1942, incl., to Honduras	$12,904.02	$14,285.51	$27,189.53
From Feb. 1924 to March 1942, incl., to other countries	7,234.66	7,114.61	14,349.27

FOREIGN CLOSED OR TRANSIT MAILS

	Letters	Prints	Total
From Feb. 1921 to March 1942, incl., to Honduras	$35.79	$96.87	$132.66
From Oct. 1928 to March 1942, incl., to other countries	4,420.59	9,940.48	14,361.07
Grand total			56,032.53

24. The mails of United States origin, represented in amounts paid as shown in the preceding finding, included mails destined to Mexico, Nicaragua, Cuba, Costa Rica, Panama, Canal Zone, Jamaica, Salvador, and British Honduras; also the payment included mails destined through the Canal to the West Coast of South America and the North Coast of Colombia.

25. The Concession between the Government of Honduras and plaintiff in connection with the *La Ceiba* and the *Yoro* has been renewed from time to time and is still in effect. The last patente de navigacion was issued for the two named vessels by the Republic of Honduras in January 1942 and, among other things, provided: "* * * and renouncement to all claim for the transportation of mails between National and foreign ports. * * *"

26. During the entire period subsequent to the ratification of the aforesaid Concession between Vacarro Bros. and Company and the Government of Honduras, no question has ever arisen between the parties thereto as to the construction or interpretation of the above quoted provision of article 5 of the Concession. There has been no arbitration under article 23 involving the particular Concession and no question involving arbitration of the Concession has arisen between the parties thereto.

27. The Post Office Department of the United States had no knowledge of the Concession between Vacarro Bros. and Company (plaintiff's predecessor) until the taking of testimony on the claim began.

The court decided that the plaintiff was not entitled to recover, and its petition was dismissed. The court further decided that the defendant was not entitled to recover on its counterclaim.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for $103,565.15, an amount alleged to be due it by the defendant for the carriage of mails between April 16, 1937, and March 1942.

Plaintiff is the successor of Vaccaro Bros. and Company. It operates steamers between the United States and Jamacia, Cuba, and Central American countries. For a number of years its ships have carried mails between the United States and some or all of these countries. It had no formal contract therefor. Its right to recover, if at all, arises from the following transactions:

On or about the first of each month plaintiff received from the Post Office Department a blank form to be filled out, giving the names of its steamers and dates of sailing, their ports of call, destination and registry. Plaintiff filled out this form and returned it. Thereafter, shortly prior to the sailing date of a steamer, plaintiff was furnished another form to be filled out, giving the name of the steamer, the registry, the time of sailing, the pier from which it would sail, the ports of call, and the speed of the steamer. This form contained the following notice:

> Mails for dispatch by outgoing steamships shall be delivered by the post office at the time agreed upon to the respective steamship companies, who must convey them to their steamships.
>
> It is understood that the mails shall be carried in accordance with the terms, conditions, and responsibilities prescribed by the Postal Laws and Regulations of the United States (or in accordance with the terms of the contract covering the service, where there is such a contract).
>
> * * * * *

This form was also duly filled out by plaintiff and returned to the Post Office Department.

Thereafter, at the time agreed upon, plaintiff called for the mail at the proper post office, received it, delivered it by truck to its steamer, and by its steamer to its destination, which was to points in Central America and the West Indies.

Plaintiff was regularly paid for the carriage of this mail at the rates prescribed by the postal laws and regulations until December 1, 1932. Thereafter, defendant paid plaintiff for so-called non-Convention mail only. From that time on it refused to pay for the carriage of so-called Convention mail, that is, mail covered by the provisions of the Postal Convention between the Americas and Spain, signed at Madrid November 10, 1931, and approved by the President February 9, 1932 (47 Stat. 1924–1956). This suit is to recover for the carriage of such mail. Defendant refused to pay for its carriage because of the provisions of that Convention.

The plaintiff company was organized under the laws of the State of Delaware, but its steamships which carried the mails in question were registered under the flag of the Republic of Honduras. Both the defendant and Honduras were signatories to this Convention. Article 3 of it (47 Stat. 1925) reads as follows:

> *Free and gratuitous transit.*—1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries. all that which the latter may send to any destination.
>
> * * * * *

The same provision was incorporated in the later Convention of 1936, ratified August 12, 1937, and approved by the President August 20, 1937 (50 Stat. 1657, 1658).

The defendant contends that under the terms of this article Honduras only is liable for the charges for the carriage of this mail. Plaintiff says that it was not a party to that Convention and is not bound by it, but that its rights are determined by the postal laws and regulations and that it

is entitled to the compensation fixed by the Postmaster General in those regulations under the authority granted by section 4009 of the Revised Statutes, as amended. To this defendant replies that the above-quoted provision of the Postal Convention was a part of the postal laws and regulations of the United States, and that according to its terms Honduras, and not the United States, was liable for the carriage of the mails in question.

Defendant is right in saying the Postal Convention is a part of the postal laws and regulations. It was entered into under the authority of R. S. 398, which reads: (Sec. 372, Title 5, U. S. C.)

> For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage or other charges on mail matter conveyed between the United States and foreign countries; *Provided*, That the decisions of the Postmaster General construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be final and conclusive upon all officers of the United States. (R. S. sec. 398; June 12, 1934, ch. 473, 48 Stat. 943.)

It has the same force and effect as any other regulation issued by the Postmaster General under authority of law. 33 Op. A. G. 276, 278; *Four Packages of Cut Diamonds* v. *United States*, 256 Fed. 305.

Under that Convention Honduras is plainly liable for the carriage of the mails in question. Under it the United States assumed liability for the carriage of mails by ships of its registry, Panama by its ships, and Honduras and the other Central American countries by their ships. Plaintiff carried the mails in question with knowledge of the terms of this Convention, and we think it is bound by it.

But, plaintiff says that it was the defendant that required it to carry the mails, and not Honduras, and from this very fact an implied contract arises on the part of the defendant to pay it compensation therefor. It points to section 4016

of the Revised Statutes, as amended (18 U. S. C. 326), which requires it to take the mail from the United States Post Office when its ships are leaving our ports, and imposes on it a fine of $1,000 for failing or refusing to do so. It also points to the Act of February 6, 1929 (ch. 157, 45 Stat. 1153), which authorizes the Postmaster General to require any steamship to carry the mail between the United States and any foreign port "at the compensation fixed under authority of law," and which authorizes the Collector of the port, or other officer, to refuse clearance of a vessel upon its refusal to accept the mail tendered. It says it was obliged under these Acts to carry the mail and, therefore, that an implied promise arose that the defendant would pay for it, whether or not Honduras was also obligated to do so.

It is true that ordinarily when the United States demands service from a person, it impliedly agrees to pay just compensation therefor, but we do not think such an implied contract arose under the facts and circumstances of this case.

Beginning with December 1, 1932, the United States refused to pay for the carriage of Convention mails, claiming that it was not liable therefor under the terms of article 3 of the Convention between the Americas and Spain. Correspondence then ensued between the parties relative thereto. This culminated in a letter from the Post Office Department to the plaintiff, dated August 7, 1933, reviewing the provisions of the Postal Convention, and stating that—

> Under the circumstances, no obligation rests upon this Department for services rendered by your company in the transportation of the mails in question by a steamship of the registry of one of these countries sailing from a United States port, such obligation having been assumed by the country whose flag the steamship flies, through the approval by the government of such country of the Convention containing the free transit provision cited above. Your claim should therefore be properly submitted to the postal administration of the country concerned for consideration.[1]

[1] This letter was not offered in evidence on the hearing before the commissioner, although it was marked for identification, exhibited to plaintiff's witness Pratt, and this witness was interrogated about it; but on the argument of the case before the court a motion was made that it be received in evidence. It is relevant, competent and material and will be received.

Plaintiff did not acquiesce in this position, but in view of it, it cannot be said that any mail delivered to plaintiff after this letter was written was delivered to it under an implied promise on defendant's part to pay for the carriage of it, in case Honduras did not. Instead of an implied promise to pay for it, there was an express refusal to do so. Plaintiff has been paid for all mail carried up to the date of that letter.

Plaintiff was paid therefor in this manner: The United States was indebted to the Honduran Department of Posts for the carriage of parcel post mail. By agreement with that Department, the United States Post Office Department on April 22, 1938, drew a United States Treasury warrant for $14,194.24, in favor of the Director General of Posts of the Republic of Honduras, and that officer endorsed the same to plaintiff in payment of its debt for the carriage of some of the mails for which plaintiff sues. In this way plaintiff was paid for all mails carried from December 1, 1932, to October 6, 1934. Subsequently, on September 1, 1940, the Post Office Department issued another United States Treasury warrant, this one for the sum of $28,574.50, payable to the Minister of Fomento, Agriculture and Labor of Honduras, and that official endorsed and delivered the same to plaintiff in payment for the carriage of the mail from October 6, 1934, to April 16, 1937.

This is further evidence that the defendant did not impliedly agree to pay for the carriage of these mails.

Unless there was a contract between plaintiff and defendant, either express or implied in fact, under which defendant agreed to pay for the carriage of the mails, there can be no recovery in this court. Since we are of the opinion that defendant neither expressly nor impliedly agreed to do so, plaintiff's petition must be dismissed.

COUNTERCLAIM

The defendant has interposed a counterclaim for the sum of $117,304.33, the amount paid plaintiff by the defendant for the carriage of mails from March 12, 1919 to January 9, 1942. In its brief it reduces this claim to $56,032.53. The claim is based upon article 5 of a contract entered into between plaintiff's predecessor, Vaccaro Bros. and Company,

and the Republic of Honduras on March 12, 1919. This article reads in part, according to the English translation thereof, as follows:

> The concessionaire undertakes to carry and forward free of charge from and to the United States of America, all mail matters which may be delivered to him by the proper post offices, addressed to ports which his steamers shall touch, regardless of the fact whether such steamers are his own or chartered. * * *

From April 1919 to the last of November 1932 defendant paid plaintiff various sums of money for all mail carried by it from ports of the United States to Honduras and other countries in the West Indies and Central America. Subsequent to November 1932 defendant paid other sums for mails carried by plaintiff's vessels to places other than Honduras. Defendant claims the right to recover all amounts paid both for the mail carried to Honduras and for that carried to other countries.

We are of the opinion that defendant is not entitled to recover any sum on its counterclaim because the contract, of which article 5 is a part, plainly was not entered into for the benefit of the United States. If it was not entered into for the benefit of the United States, then the United States cannot maintain an action on it. *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220; *Robins Dry Dock & Repair Co.* v. *Flint, et al.* 275 U. S. 303.

Article 5 is a part of a contract for a concession granted to Vaccaro Bros. and Company by the Republic of Honduras. Portions of this contract are set forth in the Gazette, the official publication of Honduras. This publication quotes articles 1, 5, 13, 14, 15, 16, 17, 21, 23, 26, 28, and 29. Under article 1 the concessionare agreed to make certain extensions of a railroad it had built in the Republic of Honduras; by article 5 the concessionaire agreed to carry the mails to and from the United States of America free of charge, and in this article it was agreed that certain freight should be exempt from certain duties, and that the concessionaire would be permitted to load and unload its products at any hour of the day or night; by article 13 Honduras agreed to grant to the concessionaire certain lands; by article

14 the concessionaire was given the right to construct branch railroad lines; by article 15 it was granted the right to cut and use timber on the national lands, the right to the use of the motive power of rivers, the right to mine and use coal and oil necessary for the operation of the railroad, the free use of national land in connection with the operation of the railway, and its laborers were given exemption from military service in time of peace, and in certain circumstances in times of war; by article 16 the concessionaire was given the right to construct telephone and telegraph lines, with the right in the Government to use these lines for the transaction of public affairs; by article 17 the concessionaire was given the right to import free of duty railroad equipment, etc.; by article 26 the concessionaire agreed to give to Honduras one-half of the net profits from the operation of a wharf which it undertook to construct; and by article 28 the concessionaire agreed to pay to Honduras an exportation fee on bananas exported from Honduras.

The above provisions of the contract have been set forth in order to show that the contract was entered into for the mutual benefit of plaintiff's predecessor and the Republic of Honduras, and that there was no purpose on the part of either of the parties to confer any benefit on the United States. No intention is manifested by this contract to relieve the United States of any liability which it might incur to plaintiff for the carriage of its mails from its ports to any other place.

What the parties intended was that the mail should be carried from and to the United States of America free of charge to the Republic of Honduras. We do not think that the parties had in mind the carriage of mails "free from any charge" which the concessionaire had a right to make against the United States.

We are of opinion that the defendant is not entitled to recover on its counterclaim.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

JONES, *Judge,* took no part in the decision of this case.

Mr. William I. Denning for plaintiff. *Messrs. John W. Cross* and *Earl C. Walck* were on the brief.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff in its motion for a new trial says that an implied contract on the part of the defendant necessarily arose to pay it reasonable compensation for the carriage of the mails since the statutes made it obligatory on it to do so, subjecting it to a fine and other penalties for refusing to do so.

In our former opinion we said:

> It is true that ordinarily when the United States demands service from a person, it impliedly agrees to pay just compensation therefor, but we do not think such an implied contract arose under the facts and circumstances of this case.

We then quoted defendant's letter of August 7, 1933, and the subsequent dealings between the parties, and concluded that there was no implied contract to pay for the carriage of the mails, but an express refusal to do so.

Under such facts we think it is clear that the penal statutes to which plaintiff refers have no application. Defendant could not constitutionally have required plaintiff to carry the mails since it expressly refused to pay for their carriage. In view of defendant's refusal to pay compensation, plaintiff could have refused to render the service and defendant would have been powerless to impose the penalties fixed in the statutes. Instead, plaintiff performed the service knowing the defendant disclaimed liability to pay for it, and it later acquiesced in arrangements made by defendant for Honduras to do so.

There was no suggestion of a threat by defendant to impose the penalties of the statutes. Although protesting against defendant's refusal to pay, plaintiff nevertheless performed the service voluntarily.

No contract express or implied having arisen to pay for the service, and the statutes having no application to such a case, plaintiff may not recover.

The other points raised in the motions for a new trial have been considered, but we think they are without merit. Plaintiff's motion for a new trial is overruled. Defendant's motion is also overruled. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge*, and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE ARUNDEL CORPORATION v. THE UNITED STATES

[No. 45655. Decided May 7, 1945]*

On the Proofs

Government contract; amount of work on dredging operation decreased by hurricane.—Where plaintiff contracted with the Government to perform dredging work in the Cape Cod Canal upon a unit price basis; and where before the formal contract had been signed a hurricane occurred which caused the current to scour the area of a large amount of the material that was to be dredged by plaintiff; it is *held* that this action of the hurricane was not a changed condition under Article 4 of the contract which would entitle plaintiff to an increase in the unit price because of the increased costs due to the decreased amount of work and plaintiff is not entitled to recover.

Same; "Changed Conditions" clause not applicable to an act of God.—The Government, by the "Changed Conditions" clause, did not assume an obligation to compensate plaintiff for any increase in dredging costs brought about not by any act or fault of the Government but caused by a hurricane, an act of God, which neither party expected or could anticipate. It is a general principle of law that neither party is responsible to the other for damages brought about by such a cause unless such an obligation has been expressly assumed. In the absence of any contract provision affording relief in the instant case, the plaintiff is not entitled to recover and the petition must be dismissed.

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*Plaintiff's petition for writ of certiorari penied October 15, 1945; rehearing denied November 13, 1945.

The Reporter's statement of the case:

Mr. William S. Hammers for plaintiff.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover $34,550.88 as an equitable adjustment under art. 4 of a unit-price contract with defendant for dredging work in the Cape Cod Canal, Massachusetts. The basis of the claim is that the contract contemplated that approximately the estimated quantity of 2,894,500 cubic yards of material, as indicated in the specifications, would be dredged; that on September 21, 1938, after plaintiff's bid as adjusted had been accepted and the contract awarded to it, but before the formal contract had been executed on October 9, 1938, a hurricane occurred which caused the current created thereby to scour or wash out of the area to be dredged 425,950 cubic yards of material, and that this was a "changed condition" within the meaning of art. 4 which, in the circumstances, required an equitable adjustment increasing the unit price from 34 cents to 35.73 cents per cubic yard, or 1.73 cents per cubic yard, to cover the claimed increased costs of operations, per cubic yard, applicable to the entire job because of the reduction in the yardage to be dredged. It is argued that the refusal of the contracting officer and the head of the department to make this adjustment constituted a breach of the contract.

Defendant contends that art. 4 is not applicable to the changed condition relied upon by plaintiff; that defendant made no warranty of the quantity of material to be removed; and that, in any event, plaintiff has not proven that it sustained actual damage as a result of the reduction by the hurricane of the amount of material necessary to be removed under the contract.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. August 4, 1938, the War Department, through its district engineer at Boston, Massachusetts, who became the con-

tracting officer under the contract as executed, advertised for bids to be opened August 24, 1938, "for furnishing all plant, labor and materials, and performing all work for dredging approximately 4,826,000 cubic yards, scow measurement, of material from Station 110+00 to Station 375+00 in the Cape Cod Canal, Massachusetts," in accordance with specifications, schedules, and drawings attached to and made a part of the bid.

The work to be done was divided into two separate areas referred to as Section A and Section B. The work in Section A consisted of dredging the north side of the Cape Cod Canal to a depth of 32 feet below mean low water over a bottom width of 100 feet from Station 110+00 to Station 375+00, a distance of about 26,500 feet. The work in Section B consisted of dredging on the south side of Cape Cod Canal to the same depth and between the same stations as Section A over a bottom width of 65 feet. The form of bid set out that the "quantity for canvassing bids" was 2,894,500 cubic yards in Section A and 1,931,500 cubic yards in Section B.

2. Two bids were received on Section A, of which plaintiff's at 34.73 cents per cubic yard, scow measurement, was the lower. Plaintiff also submitted a bid on Section B of 39.69 cents per cubic yard, scow measurement, and indicated it would accept either A or B, but not both. Plaintiff was not the low bidder on Section B, and did not receive that contract. The contract for the latter section was awarded to M. A. Breymann Dredging Company, which has a suit in this court under docket No. 45680.

The Government estimate of cost as announced at the opening of bids was 30.9 cents per cubic yard for the work to be performed in Section A, and 31.5 cents per cubic yard for the work to be performed in Section B. After the bids were opened on August 24, 1938, defendant's district engineer at Boston took the position that plaintiff's bid for the work to be performed in Section A was excessive in comparison with the Government estimate of cost. On the other hand, plaintiff maintained that the Government estimate was too low and inaccurate in some respects. However, after some discussion and negotiations between the parties, the district engi-

neer offered to award the contract to plaintiff at 34 cents per cubic yard, and on September 10, 1938, plaintiff advised the district engineer as follows:

> Confirming telephone conversation, we will accept the award of contract covering the performance of 2,894,500 cubic yards of material, scow measurement, to be removed from Section A, Cape Cod Canal, Invitation No. 175–39–13, bids for which were opened on August 24, 1938, at a unit price of Thirty-four cents ($0.34) per cubic yard, scow measurement, with boulders exceeding 1½ cubic yards, to be paid for at the rate of Twelve Dollars and Fifty Cents ($12.50) per cubic yard.

3. October 6, 1938, plaintiff, a Maryland corporation, entered into a contract with defendant whereby it agreed to furnish the material and perform the work for dredging Section A, referred to above, as described in paragraph 1–02 of the specifications attached to the contract, for the consideration of 34 cents per cubic yard, scow measurement, in accordance with the specifications, schedules, and drawings, all of which were made a part of the contract. The specifications further provided that:

> The contractor will be paid at the rate of $12.50 per cubic yard, for the removal of boulders and fragments of rock exceeding 1½ cubic yards each in size.

The work was to be commenced within 30 calendar days after date of receipt by the contractor of notice to proceed and was to be completed within a period to be determined under the specifications. Pursuant to receipt of notice to proceed, plaintiff began dredging operations November 29, 1938, and completed the work June 12, 1940.

4. The specifications contained the following provisions with respect to the work to be done, the quantity of material to be dredged, physical data, and character of material:

> 1–02. WORK TO BE DONE: (a) The work provided for herein is authorized by the River and Harbor Act of August 30, 1935.
>
> (b) The work to be done under these specifications consists of furnishing all plant, labor and supplies, and performing all work required for the dredging and

satisfactory disposal of all material encountered (see paragraphs 4–01 and 4–06), except ledge rock, over the separate areas designated as Section A and Section B and described below. The work to be done is shown on the drawings described in paragraph 1–03.

The work to be done in Section A will consist of dredging on the north side of the Cape Cod Canal to a depth of 32 feet below mean low water over a bottom width of 100 feet from Station 110+00 to Station 375+00, a distance of about 26,500 feet. The work to be done in Section B will consist of dredging on the south side of the Cape Cod Canal to a depth of 32 feet below mean low water over a bottom width of 65 feet from Station 110+00 to Station 375+00, a distance of about 26,500 feet.

(c) For purposes of acceptance, the areas to be excavated in each section are divided into sub-sections, as follows:

Sub-Section (a)—Station 110+00 to Station 140+00
Sub-Section (b)—Station 140+00 to Station 170+00
Sub-Section (c)—Station 170+00 to Station 200+00
Sub-Section (d)—Station 200+00 to Station 230+00
Sub-Section (e)—Station 230+00 to Station 260+00
Sub-Section (f)—Station 260+00 to Station 290+00
Sub-Section (g)—Station 290+00 to Station 320+00
Sub-Section (h)—Station 320+00 to Station 350+00
Sub-Section (i)—Station 350+00 to Station 375+00

1–04. QUANTITY OF MATERIAL: The total estimated quantities of material necessary to be removed from within the specified limits, exclusive of allowable overdepth, to complete the work described in paragraph 1–02 are as follows:

Location:	*Cubic yards scow measurement*
Section A—Sta. 110+00 to Sta. 375+00 (North Side)	2,423,000
Section B—Sta. 110+00 to Sta. 375+00 (South Side)	1,543,700
Total, Sections A and B	3,966,700

These amounts, plus 100 percent of the maximum quantity of estimated allowable overdepth, will be used as a basis for canvassing bids and for determining the amount of the consideration of the contract. (See paragraph on performance bond in invitation for bids.)

The maximum amount of allowable overdepth dredging is estimated to be as follows:

Location:	Cubic yards scow measurement
Section A—Sta. 110+00 to Sta. 375+00 (North Side)	471, 500
Section B—Sta. 110+00 to Sta. 375+00 (South Side)	387, 800
Total, Sections A and B	859, 300

Within the limit of available funds, the contractor will be required to excavate the entire quantity of material necessary to complete the work specified in paragraph 1–02 hereof, be it more or less than the amounts above estimated.

1–08. PHYSICAL DATA: The proposed work is located within the land section of the Cape Cod Canal and is not exposed to storm action. The maximum velocity of the normal tide current is about 4 miles an hour, changing direction every 6 hours. The mean range of tide at Station 110+00 is about 7.8 feet and at Station 375+00 is about 3.8 feet. * * *

Failure to acquaint himself with all available information concerning these conditions will not relieve the contractor of responsibility for estimating the difficulties and costs of successfully performing and completing the work as required.

Owing to the rapid currents, the material in the dredged cuts is eroded when it is disturbed by the process of dredging. During the progress of recent contracts the prescribed cuts have been secured by the contractor after the dredging of about 75% of the estimated quantity of material in the cut, scow measurement, including overdepth. The quantities of materials given in the specifications are the estimated pay yardages and are 75% of the actual quantities, scow measurement, lying between the present depth and side slopes and the final depth and side slope limits, including overdepth, of the work provided for in these specifications.

* * * * *

4–01. CHARACTER OF MATERIALS: As an index to the conditions which may be met with in the dredging to be done under this contract, reference is made to the dredging of the 315-foot channel from Station 110+00 to Station 375+00 adjacent to the work included in this contract. The material encountered consisted of peat,

sand, mud, gravel, clay, cobbles, riprap and boulders. Within this same section of the 315-foot channel, boulders varying in size from 1½ cubic yards up to about 35 cubic yards were encountered and removed by the contractor. Due to the fact that the materials in the locality are of glacial origin, no uniform stratification exists. On the south side of the canal at about Station 165+50, a piece of wreckage about 30 feet long and five feet wide will be encountered. Within the area to be dredged light poles, pile dolphins, pile stubs, and the remains of pile dolphins may be encountered.

The United States does not guarantee that other materials will not be encountered nor that the proportions of the several materials will not vary from those indicated by the explorations. Bidders are expected to examine the site of the work and the records of previous dredging operations, which are available at U. S. Engineer Office, Boston, Mass., or U. S. Engineer Sub-Office, Buzzards Bay, Mass., and after investigation, decide for themselves the character of the materials and make their bids accordingly. In the execution of the work prescribed in paragraph 1-02, all materials of the character developed by the explorations, in whatever proportions they may be encountered, or as otherwise above described and all other materials which, in the opinion of the contracting officer, can be removed and disposed of with substantially equal facility by the plant stated in the acceptance bid, shall be removed and disposed of by the contractor at the contract price. (See paragraph 4-06.)

If materials, structures, or obstacles of a substantially different character are encountered in the execution of the prescribed work and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of or less than the contract price, the contracting officer, in either alternative, will then proceed in accordance with the provisions of article 4 of the contract.

5. Provisions in the contract and specifications with respect to changed conditions, disputes, and protests and appeals read as follows:

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or

unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

1–13. PROTESTS AND APPEALS: The Chief of Engineers has been designated by the Secretary of War as his duly authorized representative to make final decision and to take other action where the terms of the contract require that such decision or action shall be "By the head of the department concerned or his duly authorized representative." If the contractor considers any work required of him to be outside the requirements of the contract, or if he considers unfair any action or ruling of the inspectors or contracting officer, he shall ask for written instructions or decision from the contracting officer immediately. Any protest based upon such instructions or decision, or claim otherwise arising under the contract, including a request for extension of time under Article 9, shall be submitted to the contracting officer within the period specified in the contract. If the contractor is not satisfied with the ruling of the contracting officer he may, where so provided in the contract, make written appeal to the Chief of Engineers. Such appeals, containing all the facts and circumstances upon which the contractor bases his claim for relief, shall be addressed to the Chief of Engineers, United States Army, and presented to the contracting officer for transmittal within the time provided therefor in the contract.

6. About June 1938, defendant had made surveys of the area to be dredged under the contract involved in this suit and in July 1938, on the basis of those surveys, had determined the estimated quantity to be dredged which was set out in the invitation for bids and the specifications. The total estimated quantity as thus determined to be removed in reaching the exact depth required, that is, 32 feet, was 2,423,000 cubic yards, scow measurement. Since it is not practical to dredge to the exact depth required over the entire surface and in order that the full depth might be reached, plaintiff was permitted to dredge to an additional depth of 3 feet and also to exceed the specified depth limits on the side slope to a certain extent and receive pay therefor in accordance with the following specification:

> 4-03. OVERDEPTH AND SIDE SLOPES: To cover inaccuracies of the dredging process, material actually removed within the specified area to be dredged to a depth of not more than 3 feet below the required depth will be estimated and paid for at full contract price.
>
> Material actually removed, within limits approved by the contracting officer, to provide for final side slopes not flatter than 1 on 2½, but not in excess of the amount originally lying above this limiting side slope, will be estimated and paid for, whether dredged in original position or after having fallen into the cut. In computing the limiting amount of side-slope dredging an overdepth of 3 feet, measured vertically, will be used. Material taken from beyond the limits above described will be deducted from the total amount dredged as *excessive overdepth dredging*, or *excessive side-slope dredging*, and will not be paid for. Nothing herein shall be construed to prevent payment, under the provisions of paragraphs 4-07 and 4-08, for the removal of shoals within the limits of dredging prescribed in paragraph 1-02, whatever the ultimate source of the material in such shoals.

The total amount of allowable overdepth and overslope for which pay would be allowed in accordance with the July 1938 determination was 471,500 cubic yards, scow measurement. On the basis of these surveys and the determination of quantity to be dredged, the specifications were prepared on which the invitations for bids were issued and the quantities

thus shown fairly represented the amount of material in the area to be dredged at that time.

Plaintiff made no detailed investigation of the site to be dredged, but it was generally familiar with that area by reason of having completed dredging operations under two subcontracts on the south side of Cape Cod Canal in the summer of 1938. In addition, plaintiff or plaintiff's officers, had had experience on work in that area over a period of many years prior to 1938. However, in making its bid it relied on defendant's representation as to the quantity and quality of material to be dredged without taking borings or making an engineering survey.

7. Subsequent to the opening of bids on August 24, 1938, and the acceptance of plaintiff's bid, but prior to the execution of the contract on October 6, 1938, and prior to the beginning of dredging operations by plaintiff on November 29, 1938, a hurricane occurred along the New England coast on September 21, 1938, in which the velocity of the wind during the peak of the hurricane was approximately 90 to 100 miles per hour and the velocity of the water at some points in Cape Cod Canal where plaintiff's dredging operations were to be carried out was 10 to 12 miles per hour. The unusually strong currents created by the hurricane of 10 to 12 miles per hour as compared with the maximum velocity of the normal tidal currents of about 4 miles per hour removed a substantial amount of material from the area to be dredged by plaintiff, as set out in finding 8, although neither party was aware of the reduction in yardage until after certain surveys hereinafter referred to were made and the dredging operations had been started.

8. In October and November 1938, shortly prior to the beginning of dredging operations, defendant, in accordance with its usual custom, caused certain predredging surveys to be made. Upon completion of these surveys, defendant estimated that the material to be dredged under plaintiff's contract was 2,468,550 cubic yards instead of 2,894,500 cubic yards set out in the specifications, a reduction of 425,950 cubic yards, and found that the greatest reduction had occurred at the easterly or Cape Cod Bay end of the project between Stations 110 and 190 where the reduction amounted to approxi-

mately 317,000 cubic yards. The new computations were completed and tabulated during December 1938 and were furnished to plaintiff in the early part of January 1939. Upon receipt of that information, plaintiff on January 16, 1939, made the following request of the contracting officer:

> In connection with our contract for dredging Section A, Cape Cod Canal, we understand a new survey before dredging shows that yardage for this contract has been reduced from 2,894,500 c. y. to 2,468,550 c. y.
>
> This reduction of approximately 15% within the contract limits was caused by hurricane of September 21, 1938, or some other cause entirely beyond our control.
>
> Inasmuch as we will be required to cover the same area to get this reduced yardage, we want to respectfully request that either you adjust our price or give us compensating yardage to take care of this changed condition.

January 17, 1939, defendant's representative replied to that letter in part as follows:

> On the basis of the reduced yardage as stated in your letter, information is desired as to what modification of the unit price you feel should be made. This price should be supported by data showing in detail how you arrive at the figure.

9. In reply to the contracting officer's letter of January 17, 1939, plaintiff by letter of March 6, 1939, urged that there should be a modification of the bid price because the reduction in yardage during the hurricane of September 21, 1938, of approximately 425,950 cubic yards was of the more easily dredgeable material with high bank and that 85 percent of the loss was between Stations 110 and 190 where it had estimated its maximum production due to bank, character of material, and short tow to the disposal area in Cape Cod Bay. On the basis of these alleged conditions, plaintiff asked for an increase in its contract price for the entire operation from 34 cents to 35.96 cents per cubic yard, scow measurement.

In response to that letter, the contracting officer on April 5, 1939, requested facts and figures in support of the claim with a complete analysis thereof and appropriate reference to the provisions of the contract under which plaintiff contended such an adjustment in contract price might be made.

10. In response to this letter plaintiff on May 19, 1939, advised the contracting officer that the request for an increase in the contract price was made "because of a changed condition due to an act of God, entirely beyond our control, caused by the severe hurricane storm of September 21, 1938, when approximately 426,000 c. y., scow measurement, was scoured from our area." The letter made reference to paragraph 4–01 (set out in finding 4) of the specifications as a basis for a change in the contract price on account of changed condition. In support of its contention that the contract price should be increased from 34 cents to 35.96 cents per cubic yard, scow measurement, the following statements and data were presented:

> (b) *Increased cost due to reduction in output because of loss of more easily dredgeable material, lowering of bank and increased average distance to dumping ground.*
>
> Our modified price is based entirely on reduced production between stations 110 and 190. In this 8,000 feet, a loss of approximately 350,000 c. y. of the softer and least costly material took place.
>
> Between these limits our original estimate contemplated dredging of approximately 1,000,000 c. y. of soft and hard material. We now have 650,000 c. y. of mostly hard material. We also have only ⅔ of the bank which necessitates 30% greater dredge advance per scow load of dredging.
>
> The average distance to the dumping ground for this section is 7.8 miles against 9.5 miles for the average of job as originally estimated. The loss of this short-tow material has the effect of increasing average tow of changed job to 9.7 miles, or an increase of 0.2 mile. This longer tow will make coordination of scow loading and tow movements less effective and will increase cost of work.
>
> The above considerations have a net effect of a 10% drop in rate of production between stations 110 and 190 which is equivalent to a 3½% reduced output for entire job. Our figures show this has effect of increasing price 1.52¢ per c. y., scow measurement.
>
> (c) *Increased cost per yard of fixed-cost items.*
>
> Our estimate for moving the plant to and from job was approximately $14,000.00. On the basis of reduction from 2,894,500 scow-yards to 2,468,567 scow-yards,

this charge which is fixed increases our cost 0.08¢ per c. y., scow measurement.

Our allowance for nonpay overdepth is unchanged and on the basis of reduction in yardage increases our cost 0.36¢ per c. y., scow measurement.

11. June 28, 1939, the contracting officer denied plaintiff's request for an increase in the contract price, and advised it in part as follows:

> The remark in your letter that "our modified price is based entirely on reduced production between stations 110 and 190" is not understood in view of the fact that, as yet, you have done no dredging between those stations. Presumably, it is your thought that there is some likelihood of the rate of dredging in that locality being reduced. That part of your estimate of increase in cost appears, therefore, to be based upon anticipated events rather than upon data now in hand.
>
> As to the request as a whole, whether or not it later develops that your production between stations 110 and 190 is actually reduced, the fact that there is a decrease in yardage between those stations is not believed to afford any justification for an increase in the contract price.
>
> In reaching that decision, I am mindful of the fact that Paragraph 1–04 of the specifications lists the approximate number of cubic yards of material that it is expected you would be required to remove. The quantity listed is given as an approximation, and is said in the same paragraph to be for purposes of canvassing bids and for determining the amounts thereof. In the closing remarks of Paragraph 1–04, it is stated that "the contractor will be required to remove the entire quantity necessary to complete the work specified in Paragraph 1–02 hereof, be it more or less than the amounts above estimated." The Government has made no warranty that the quantity listed would actually be found within the prescribed limits of dredging. To the contrary, notice is given in Paragraph 1–08 of the specifications that a reduction in quantity, through scour, was to be expected.

12. July 28, 1939, plaintiff appealed to the Chief of Engineers from the foregoing decision of the contracting officer denying plaintiff's request for an increase in contract price. September 1, 1939, the contracting officer acknowledged receipt of plaintiff's appeal addressed to the Chief of Engineers

and forwarded to plaintiff his findings of fact and conclusion based thereon, which were as follows:

> The District Engineer takes the position that inasmuch as the work to be done, as set forth in paragraphs 1-02 and 1-04 of the specifications, is that of dredging and disposing of all of the material within certain definitely prescribed limits, whether the quantity be more or less than the estimated yardage, the change in yardage could not be made the basis of a claim for an increase in the contract price. The District Engineer also calls attention to the fact that as yet the work has not been performed in the section about which the complaint is made, and takes the position that a showing of fact in support of the alleged increase in operating cost cannot be made until the work in that section has been completed.
>
> 16. The basic facts in connection with the contractor's claim herein disclosed are the following:
>
> (a) In the section of the work for which an increase in price is claimed, the yardage as originally estimated has been reduced by a considerable amount, approximately 317,000 cubic yards, as estimated by a survey completed in November 1938.
>
> (b) No provision is made in the contract by which the reduction in yardage affords the contractor grounds for claiming an increase in the contract price.
>
> (c) Work in the section about which complaint is made not having been performed, the claim is based upon anticipated increases in operating costs rather than upon facts and figures now in hand.
>
> 17. In view of the foregoing findings, there appears to be no justification for allowing an increase in the contract price.

13. October 17, 1939, the Chief of Engineers sustained the ruling of the contracting officer and advised plaintiff of his decision, which was in part as follows:

> I have carefully considered the arguments advanced by you but am unable to agree with your contention that additional compensation is warranted you under the provisions of paragraph 4-01 of the specifications or Article 4 of your contract. The remaining material which you state is more difficult to dredge does not constitute a changed condition, because its character does not differ from what was contemplated. Furthermore, the change in ratio between the softer and harder materials does not place it within this category. Paragraph 1-04 of the specifications lists the approximate

number of cubic yards of material that it was expected you would be required to move. It is stated that this quantity "will be used as a basis for canvassing bids and for determining the amount of the consideration of the contract." Also, this paragraph provides "Within the limit of available funds, the contractor will be required to excavate the entire quantity of material necessary to complete the work specified in paragraph 1–02 hereof, be it more or less than the amounts above estimated." The object of these provisions is obviously to obtain a completed work; the Government makes no warranty that you will be able to remove the quantity of material listed therein but in fact specifically places you on notice that reduction in quantity through scour should be expected.

14. As heretofore shown, plaintiff began dredging operations November 29, 1938, and completed the work June 12, 1940. The work was started at Station 368 and during the period November 29, 1938, to February 25, 1939, the work was being carried on between Stations 375 and 347+50. Except for 13 days during February and March 1939, no dredging operations were carried out between Stations 110 and 200 until October 1939, and the principal part of the work in that area was performed in October, November, and December 1939, and January 1940. In general, the winter season is less favorable for dredging operations in the Cape Cod Canal than other seasons of the year.

The work performed between stations 110 and 200 was not slowed up or affected by any unseasonal weather or winter conditions prevailing during the period of its performance.

15. In making its request of May 19, 1939, to the contracting officer for a revision of its unit price, plaintiff asked that the unit price be increased from 34 cents to 35.96 cents per cubic yard for all pay yardage dredged under the contract, that is, an increase of 1.96 cents. At that time much of the work remained to be done and only a small part had been accomplished between Stations 110 and 190. In its petition, which was filed after the work was completed, plaintiff asked for recovery of $39,565.60 based upon the foregoing increase in unit price of 1.96 cents per cubic yard as applied to a total of 2,018,653 cubic yards of material dredged and removed. In the evidence offered in support of its claim, plaintiff has

reduced the increase in unit price to 1.73 cents per cubic yard and seeks recovery of $34,550.88, based upon an application of that increase in unit price to 1,997,161 cubic yards, the total number of cubic yards for which it received pay under the contract.

16. The manner in which the claimed increase in price of 1.73 cents per cubic yard was computed by plaintiff is shown by the accompanying schedule A, which is made a part of this finding, and which sets out a comparison between the data used in its original estimate and data set up after the work had been completed.

17. The following explanation is given of the data appearing hereinafter in schedule A set out as a part of finding 16:

The total quantity of pay yardage used in the "Original Job Estimate," 2,894,500 cubic yards, is the amount heretofore referred to as appearing in the specifications as the quantity estimated by the Government to be dredged, including allowable overdepth. The other figures under that heading are estimates based upon plaintiff's past experience as to production, costs, and other items. In general, the method pursued in arriving at the estimated unit cost is similar to the method usually employed by the district engineer in computing the estimated unit cost of a given job.

The figures in the "Actual Wind-up Final Details" as to quantities dredged and time consumed represent actual figures in carrying out the contract. The actual time of plant on the job is divided into actual production in order to arrive at the average monthly production, and this method corresponds to what was done under the original job estimate in arriving at the estimated average monthly production.

18. The estimated cost of plant per month under the original job estimate is arrived at as follows:

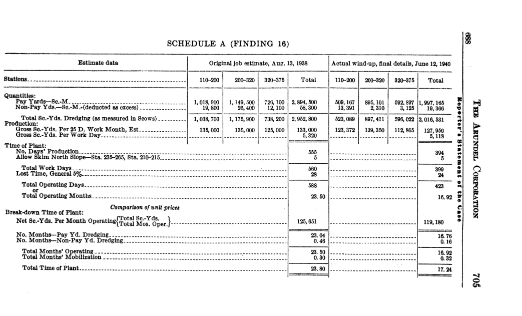
Total estimated operating cost	$43,700.00
Profit—10%	4,370.00
Bond premium @ ¾ of 1%	360.53
Total gross operating cost	$48,430.53

19. The specifications provided that the contractor would be paid $12.50 per cubic yard for the removal of boulders.

In work of this character it is not practical to segregate the cost of boulder removal from the cost of common excavation. The presence of boulders and the removal thereof affect the progress of the dredge in removing common excavation and in computing either estimated or actual costs on a job of this character. The usual method pursued is to combine the costs of boulder yardage and common excavation.

For the purpose of its bid of 34.73 cents per cubic yard, referred to in finding 2, plaintiff estimated that pay boulders would average 500 cubic yards per month of operating time, which at $12.50 per cubic yard would amount to $6,250, and deducted that amount from the total estimated operating cost (plus profit), $48,430.53, in arriving at a net estimated operating plant cost of $42,180.53. As shown in that same finding, plaintiff later agreed to do the work for 34 cents per cubic yard and the contract was executed on that basis. In determining the "Break-down Cost of Plant" in schedule A set out in finding 16, plaintiff multiplied the total estimated pay yardage, 2,894,500 cubic yards, by the contract price, 34 cents per cubic yard, and arrived at a total estimated contract price of $984,130. From that amount it deducted estimated mobilization costs of $14,529.16 ($48,430.53×.3 month) and arrived at an amount of $969,600.84, which it divided by the estimated months of operations, 23.5, in order to arrive at the estimated monthly cost of operating, $41,-259.61. This latter figure was used instead of $42,180.53 (total estimated monthly cost, $48,430.53, less estimated monthly boulder receipts, $6,250) in order to arrive at the total estimated cost for both pay and nonpay dredging.

SCHEDULE A (FINDING 16)



Estimate data	Original job estimate, Aug. 13, 1938				Actual wind-up, final details, June 12, 1940			
Stations	110-200	200-320	320-375	Total	110-200	200-320	320-375	Total
Quantities:								
Pay Yards—Sc.-M.	1,018,900	1,149,500	726,100	2,894,500	509,167	895,101	592,897	1,997,165
Non-Pay Yds.—Sc.-M.-(deducted as excess)	19,800	26,400	12,100	58,300	13,391	2,310	3,125	19,366
Total Sc.-Yds. Dredging (as measured in Scows)	1,038,700	1,175,900	738,200	2,952,800	523,089	897,411	596,022	2,016,531
Production:								
Gross Sc.-Yds. Per 25 D. Work Month, Est.	135,000	135,000	125,000	133,000	123,372	139,350	112,865	127,950
Gross Sc.-Yds. Per Work Day				5,320				5,118
Time of Plant:								
No. Days' Production				555				394
Allow Skim North Slope—Sta. 235-265, Sta. 210-215				5				5
Total Work Days				560				399
Lost Time, General 5%				28				24
Total Operating Days				588				423
or								
Total Operating Months				23.50				16.92
Comparison of unit prices								
Break-down Time of Plant:								
Net Sc.-Yds. Per Month Operating {Total Sc.-Yds. / Total Mos. Oper.}				125,651				119,180
No. Months—Pay Yd. Dredging				23.04				16.76
No. Months—Non-Pay Yd. Dredging				0.46				0.16
Total Months' Operating				23.50				16.92
Total Months' Mobilization				0.30				0.32
Total Time of Plant				23.80				17.24

SCHEDULE A (FINDING 16)—Continued

Estimate data	Original job estimate, Aug. 13, 1938				Actual wind-up, final details, June 12, 1940			
Stations	110-200	200-320	320-375	Total	110-200	200-320	320-375	Total
Break-down Cost of Plant:								
Amount for Pay Yd. Dredging @ $41,259.61 per month				$950, 621. 42				$691, 511. 06
Amount for Non-Pay Yd. Dredging @ $41,259.61 per month				18, 979. 42				6, 601. 54
Amount for Mobilization @ $48,430.53 per month				14, 529. 16				15, 497. 77
Total Amount for Job			Contract	$984, 130. 00				$713, 610. 37
Break-down Unit Prices:								
Unit Amt. for Pay Yd. Dredging			cents	32. 84			cents	34. 62
Unit Amt. for Non-Pay Yd. Dredging			cents	0. 66			cents	0. 33
Unit Amt. for Mobilization			cents	0. 50			cents	0. 78
Total Unit Amount Job			Contract cents	34. 00			Wind-up cents	35. 73

20. These same estimated monthly cost figures of $41,259.61 in the case of pay and nonpay yardage dredging and $48,-430.53 in the case of mobilization were also used in the schedule set out in finding 16 under "Actual Wind-up Final Details" to arrive at the estimated "Breakdown Cost of Plant" on the respective operations, for purposes of comparison, by multiplying these estimates by the actual number of months engaged on the respective operations, which gave a total of $713,610.37. On the basis that had the actual yardage and the time required for its removal been known when the bid was submitted, a higher bid, 35.73 cents per cubic yard, would have been submitted.

An application of this increase in bid price of 1.73 cents per cubic yard (35.73 cents instead of the contract price, 34 cents) to the total yardage removed, 1,997,161 cubic yards, makes an amount of $34,550.88, which is the amount of recovery now sought in this suit.

21. As shown in finding 18, plaintiff's estimated monthly operating cost, exclusive of profit, was $44,060.53. In carrying out the work plaintiff removed 1,997,161 cubic yards of pay yardage for which it received (at the contract price of 34 cents per cubic yard) $679,034.74. Plaintiff also received $181,656.25 for removal of boulders instead of $146,875 as estimated. With these factors as a basis, an excess of receipts over estimated costs is shown as follows:

Total common excavation—1,997,161 cu. yds. at 34¢	$679,034.74
Total boulder yardage—14,532.5 cu. yds. at $12.50	181,656.25
Total payments received	$860,690.99
Cost of performing work based on the actual time consumed, 17.24 months, and the estimated monthly operating costs, $44,060.53	759,088.81
	$101,602.18

22. As shown from the schedule set out on pp. 17 and 18, as a part of finding 16, the average estimated monthly yardage as computed by plaintiff in its original job estimate was 133,000 cubic yards, and in carrying out the work the average monthly production was 127,950 cubic yards, that is, a reduction of 3.8 percent, which was within a reasonable approximation of the original estimate. Between Stations 110 and 200, where the

greatest reduction in yardage took place on account of the hurricane, the original monthly estimate was 135,000 cubic yards, and the actual average monthly production was 123,372 cubic yards, that is, a reduction of 8.6 percent. Between Stations 320 and 375, which were least affected by the hurricane, the original monthly estimate was 125,000 cubic yards and the actual monthly production was 112,865, that is, a reduction of 9.7 percent. In estimating the progress of dredging in Cape Cod Canal it is reasonable to allow for a variation of from 3 to 10 percent.

23. As heretofore shown, in completing the job plaintiff excavated and received pay for 1,997,161 cubic yards. Plaintiff left in place within the pay prism 219,531 cubic yards, of which quantity 60,823 cubic yards were left within the required contract area and 158,708 cubic yards within the allowable overdepth dredging area, thus showing a total of 2,216,692 cubic yards available for dredging as compared with the estimate of 2,468,550 cubic yards after the hurricane and 2,894,500 as shown in the invitation for bids.

24. The record does not satisfactorily establish that the reduction in yardage due to the hurricane materially affected plaintiff's monthly progress or its unit costs in carrying out this work. Such reduction did not require a change in the specifications and plaintiff completed the contract without any change therein.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Article 4 of the contract under which plaintiff makes its claim for an increase of 1.73 cents per cubic yard for 1,997,161 cubic yards of material dredged, over the contract unit price of 34 cents a cubic yard, is set forth in finding 5. The pertinent provisions of the specifications prepared prior to August 4, 1938, with reference to the estimated "quantity of material" to be removed, the "physical data," and the "character of materials" expected to be encountered are set forth in finding 4. The estimated quantity of material which defendant considered would have to be removed to reach the

depth of 32 feet shown by the contract drawings was obtained by surveys made in June 1938 (finding 6), which estimated quantity, including allowable overdepth dredging, was 2,894,500 cubic yards. It is not claimed that at that time this estimate was not accurate or reasonably so.

Paragraph 1–04 of the specifications discloses that the estimate of the amount of material to be removed was for the purpose of obtaining "a basis for canvassing bids and for determining the amount of the consideration of the contract," and stated that the contractor would "be required to excavate the entire quantity of material necessary to complete the work, be it more or less than the amounts above estimated."

Paragraph 1–08 stated that "The proposed work is located within the land section of the Cape Cod Canal, and is not exposed to storm action." This statement, of course, did not contemplate hurricane action. However, this paragraph further stated that "Failure [of the contractor] to acquaint himself with all available information concerning these conditions will not relieve the contractor of responsibility for estimating the difficulties and costs of successfully performing and completing the work as required." The paragraph further stated that "Owing to the rapid currents, the material in the dredged cuts is eroded when it is disturbed by the process of dredging"; that on recent contracts the prescribed cuts had been secured by the contractor after the dredging of about 75% of the estimated quantity in the cut, including overdepth, and that "The quantities of materials given in the specifications are the estimated pay yardages and are 75% of the actual quantities, scow measurement, lying between the present depth and side slopes and the final depth and side slope limits, including overdepth, of the work provided for in these specifications." Thus plaintiff was advised how the estimate of the total quantity of material to be removed had been computed. If the hurricane of September 21, 1938, which neither party anticipated or could have foreseen, had not occurred, plaintiff would have dredged substantially the amounts indicated.

Paragraph 4–01 described the character of materials, as found by defendant in June 1938, in the area to be dredged,

but set forth that the Government "does not guarantee that other materials will not be encountered nor that the proportions of the several materials will not vary from those indicated by the explorations." This paragraph further stated that "If materials, structures, or obstacles of a substantially different character are encountered in the execution of the prescribed work and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of or less than the contract price, the contracting officer, in either alternative, will then proceed in accordance with * * * article 4 of the contract."

The specifications were furnished plaintiff before it made its bid, in which it agreed to execute the standard form of contract, of which the specifications were to be and did become a part. Art. 4, which was the standard provision of such a contract, provided that should the contractor encounter or the Government discover, during progress of the work, "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," the contracting officer would investigate, and "if he finds that they do so materially differ, the contract shall * * * be modified to provide for any increase or decrease of cost * * * resulting from such conditions."

It will be seen from the specification provisions referred to that defendant only gave plaintiff the information which it had obtained in June 1938, and made no warranty or binding representation that plaintiff would not encounter conditions differing from those indicated as to the quantity of material; the effect of storm or hurricane action; the amount of pay yardage; or that only materials of the character described would be encountered. By these provisions it only bound itself to make an equitable adjustment if materials, structures, or obstacles of a substantially different *character* from those described in par. 4–01 were encountered, and that did not occur.

The subsurface or latent conditions materially differing from those shown or indicated in the contract, referred to and contemplated by the first part of art. 4, were subsurface or hidden conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted, and because of which unknown conditions the representation or indication in the plans and specifications would have to be substantially varied or changed in order for defendant to obtain the completed work as called for and intended by the contract.

The second part of art. 4 contemplated unknown subsurface conditions of an unusual nature and differing materially from those ordinarily encountered and generally recognized as inhering in the character of work called for, even though no representation had been made or indication given with reference thereto in the specifications or on the drawings. In other words, in order to obtain low bids and a revision of the contract price the Government agreed to pay additionally, through an equitable adjustment, for any extra work and expense ordered in addition to that originally anticipated on the basis of the plans and specifications, and the contractor agreed to a reduction of the contract price, through an equitable adjustment, for work originally contemplated but later found by defendant not necessary to be performed and ordered eliminated. We think the Government did not, by art. 4, assume an obligation to compensate plaintiff through an increase in the contract unit price for any increase in its anticipated dredging costs per cubic yard, or reduction of its anticipated profit not caused by any act or fault of the Government, but brought about and caused by a hurricane which neither party expected or could anticipate. *The Arundel Corporation* v. *United States*, 96 C. Cls. 77. The plaintiff assumed the risk of the amount of material to be dredged being reduced, as it was, by the hurricane, an act of God, just as the Government would have had to assume the risk of having to pay for an increase in the material necessary to be dredged for the same reason, as was the case in *Tacoma Dredging Co.* v. *United States*, 52 C. Cls. 447, where a flood caused an increase of 67,000 cubic yards. It is a general

principle of law that neither party to a contract is responsible to the other for damages through a loss occasioned as a result of an act of God, unless such an obligation is expressly assumed. Here, the contract was silent in that regard and whatever loss plaintiff may have sustained must be borne by it, and not by the Government.

Plaintiff is not entitled to recover, and the petition must, therefore, be dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

Article 4 of the contract, quoted in finding 5, says:

> ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

I think the provisions of the article were applicable and the contracting officer was under a duty to make an equitable adjustment. The purpose of the article is to induce bidders not to increase their bids because of fear of unknown impediments to profitable performance. For the sake of obtaining a lower bid the Government is willing to forego the security of an unconditional promise of the contractor to accomplish specified results for a fixed or computable price, regardless of impediments. If the article is to accomplish its purpose, it must mean, in a case like this, that the physical facts which the Government describes in its invitation for bids and which

the bidder assumes in computing his bid, may be taken as given, so far as they are material to the computation. If, as here, the bid is a unit price bid, the approximate number of the units, and the average quality of the units, with regard to the ease or difficulty of their handling, are the things most essential to know in computing the bid. If the bidder figures the bid closely, as Article 4 is intended to induce him to do, but finds upon performance that the number of pay units is some hundreds of thousands less than both parties supposed, and that the missing units are those which would have been easiest and most profitable to handle, he in fact loses money though he has bid prudently. If the Government had knowingly or negligently misled him into the same financial plight in which he finds himself, it would be liable to him in damages. I think that, in general, Article 4 means that the Government promises him equitable treatment when he finds himself in that situation, though it was not at fault in getting him there.

Here the Government survey had shown that approximately 2,894,500 cubic yards of pay dredging would be available in the plaintiff's section. In setting that figure it had discounted the gross amount in place by 25% because of expected erosion due to the normal currents flowing through the cuts while dredging was going on. The Government and the plaintiff assumed that the materials to be dredged would have the normal quality of canal bottom materials with which both were familiar, from past experience. The plaintiff made its bid. Then came the hurricane and scoured out some hundreds of thousands of pay units of the materials, most of the units being of a quality most profitable to handle, and being removed from a location where they could have been hauled away by the shortest haul. The Government and the plaintiff, still in ignorance of the changed condition, made their contract. As I have indicated, I think that when the true condition was discovered, an equitable adjustment was due under the contract.

The statements of the contracting officer and the Chief of Engineers, in answer to the plaintiff's claim, do not seem to me to answer it. They point out that the estimated yardage given in the invitation for bids was only an approximation, and that the invitation said that reduction in quantity through

scour was to be expected. But that expected reduction had been discounted in the invitation, and a hurricane was not to be expected, and was not expected. The condition was in fact as unforeseen and unusual as the hurricane which produced it.

I am not suggesting that Article 4 is intended to remove all risks from Government contracts. I think the holding in *Arundel Corporation* v. *United States*, 96 C. Cls. 77, that when an unusual flood destroyed the contractor's work when half finished, the Government was not liable, was right. Article 4 did not in terms apply. But I think it does apply here, and I would give the plaintiff a judgment.

JONES, *Judge*, took no part in the decision of this case.

A. ATWATER KENT v. THE UNITED STATES

[No. 46037. Decided May 7, 1945]

On the Proofs

Income tax; excess income under trust instrument accumulated for benefit of grantor, who was also trustee.—Where the grantor, plaintiff, executed certain trust instruments in which it was provided that after the payment of specified amounts from the annual income of each trust to the respective beneficiaries, the balance of the income should be accumulated and held by the trustees, of which grantor was one, for the period of 2 years, at the end of which time it was to be distributed to the grantor, if living; it is *held* that the plaintiff under the provisions of section 167 of the Revenue Act of 1936, is liable for income tax on the portion of the trust income so accumulated for the tax years 1936 and 1937. *Kent* v. *Rothensies*, 120 Fed. (2d) 476; certiorari denied, 314 U. S. 659.

Same; contingent accumulations.—Section 167 (a) (1) of the Revenue Act of 1936, providing that trust income held for future distribution to the grantor is taxable, and Article 167-1, Regulation 94, are applicable, even though there is uncertainty of a distribution to the grantor, since under this section the income need not be held unconditionally for future distribution to the grantor.

Same; res adjudicata.—The court having before it the Government's plea of *res adjudicata*, as well as an agreed statement of facts, the decision is on the merits and not on the plea of *res adjudicata*. Cf. *Engineers Club of Philadelphia* v. *United States*, 95 C. Cls. 42; certiorari denied, 316 U. S. 700.

The Reporter's statement of the case:

Mr. James O. Wynn for the plaintiff. *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. J. Louis Monarch* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff was born December 3, 1873. At all times herein mentioned prior to 1942, he was a resident of Pennsylvania. He is now a resident of California.

2. May 20, 1932, plaintiff, as grantor, and plaintiff and Provident Trust Company of Philadelphia, as grantees and trustees, duly executed a deed of trust creating the Elizabeth Kent Van Alen Trust, a copy of that deed of trust being marked Exhibit 1 and made a part hereof by reference.

3. On the same day, May 20, 1932, plaintiff, as grantor, and plaintiff and Fidelity-Philadelphia Trust Company, as grantees and trustees, duly executed a deed of trust creating the Virginia Tucker Kent Trust, a copy of that deed of trust being marked Exhibit 2 and made a part hereof by reference.

4. Also on the same day, May 20, 1932, plaintiff, as grantor, and plaintiff and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as grantees and trustees, duly executed a deed of trust creating the A. Atwater Kent, Jr. Trust, a copy of that deed of trust being marked Exhibit 3 and made a part hereof by reference.

5. Elizabeth Kent Van Alen, Virginia Tucker Kent and A. Atwater Kent, Jr., are now living.

6. A copy of the "General Family Trust" referred to in each of the trusts described in findings 2, 3, and 4, is marked Exhibit 4 and made a part hereof by reference.

7. The trust instruments referred to in findings 2, 3, and 4 were identical except as to names and the schedules of payments. The Elizabeth Kent Van Alen Trust contained the

following provisions which were similar to corresponding provisions in the other trust instruments:

A. Atwater Kent hereby transfers to the trustees twenty-eight thousand seven hundred sixty-two (28,762) shares of the no par value preferred dividend stock of the Atwater Kent Manufacturing Company, the receipt of which is acknowledged, to be held by the trustees under the following trusts:

I. *The Beneficiaries*

(A) To hold the trust fund in trust until the death of the last survivor of grantor, the wife Mabel Lucas Kent and the daughter; and out of the net income to pay—

(1) To the daughter during her life the yearly sums stated in the annexed schedule;

(2) After the death of the daughter, to apply a maximum of ten thousand dollars ($10,000.00) a year to the maintenance and education of each of the daughter's children during minority, after majority to pay each the maximum of ten thousand dollars ($10,000.00) a year for life; should the total payments of this paragraph exceed one half the net income for the year, the payments shall be reduced so as to bring the total to the one half;

(3) After making the payments to the daughter or her children, provided in paragraphs I (A) (1) and I (A) (2):

(a) During the life of the grantor each remaining item of income received by the trustees shall be accumulated and held by the trustees for two years after its receipt; the items after being held two years shall then be paid as follows:

(aa) The items whose two-year accumulation matures January to June, inclusive, shall be distributed June thirtieth; so much of the June thirtieth distribution (but not exceeding five thousand dollars ($5,000)) shall be paid to the daughter or her children as may be needed to bring the payments of the last preceding calendar year up to the maximum amount stated for that year. The items whose two-year accumulation matures July to December, inclusive, shall be distributed December thirty-first, so much of that distribution (but not exceeding five thousand dollars ($5,000)) shall be paid to the daughter or her children as may further be needed to bring the payments of the last preceding calendar year up to the maximum amount stated for that year.

(bb) The balances of the June thirtieth distribution and of the December thirty-first distribution shall be paid the grantor, if living at those respective dates (which will necessarily be two years or more after the trustees receive any item of income included in the distribution).

(cc) At the death of the grantor any item which is being accumulated and held and as to which the two years have not expired, shall not be used to bring payments to the daughter or her children to maximum amounts but shall be paid at once to the wife, Mabel Lucas Kent, if living; if the wife, Mabel Lucas Kent, is not living, it shall be paid at once to the daughter, if living; if neither is living, it shall be paid to those who will receive the principal under paragraph I (B) and in the proportions of paragraph I (B).

(dd) Under no circumstances or method of accounting shall the grantor, or his estate, his heirs, next of kin, or assigns become entitled to any interest on accumulated items or to any income of the trust fund, received, earned, or accrued subsequent to the day which proves to be two years before the death of the grantor. And the two years' accumulation and holding of items of income shall continue during the entire life of the grantor irrespective of the previous deaths of the wife, Mabel Lucas Kent, and/or the daughter, and/or the daughter's children.

(b) After the death of the grantor the income remaining after the payments to the daughter or her children shall not be accumulated or used to bring payments to the daughter or her children to maximum amounts but shall be paid currently to the wife, Mabel Lucas Kent, during her life.

(c) After the death of the survivor of the grantor and the wife, Mabel Lucas Kent, the payment to the daughter of the yearly sums under I (A) (1) shall end and the trustees shall pay the entire net income currently to the daughter during her life.

(B) After the death of the last survivor of the grantor, the wife Mabel Lucas Kent and the daughter, the trustees shall transfer the principal:

(1) Three quarters thereof to the then living issue of the daughter in such proportions as the daughter shall appoint by will; in default of appointment, to such issue per stirpes;

(2) One quarter thereof to the daughter's husband if then living and/or the then living issue of the daughter

in such proportions as the daughter shall appoint by will; in default of appointment to such issue per stirpes;

(3) If there is no such issue the three quarters of paragraph I (B) (1) and the one quarter of I (B) (2), or so much thereof as has not been appointed to the daughter's husband, shall be transferred to the trustees under a deed of trust, dated today, between A. Atwater Kent, grantor, and the Fidelity-Philadelphia Trust Company and A. Atwater Kent, grantees and trustees, entitled "General Family Trust," and the principal of the present trust shall form part of that trust.

(4) The shares of a minor shall continue to be held in trust until majority, the trustees applying so much of the income thereof as they deem advisable to the support and maintenance of the minor.

(C) Any principal or income not disposed of hereby or through the "General Family Trust" shall be transferred and paid for benevolent or philanthropic purposes to the Atwater Kent Foundation, Inc., a Delaware corporation.

(D) If Mabel Lucas Kent should not remain the wife of the grantor to the time of his death, she shall receive nothing from this trust; and, her life shall not be considered in determining the duration of the trust or any period of payment; in applying the language of this trust she shall be regarded as having died on the day she ceased to be the wife of the grantor.

The "annexed schedule" referred to in (A) (1) above reads as follows:

One-half the income of the trust fund for the year, but not exceeding the following maximum amounts:

In 1932	Nothing to be paid
1933	$10,000
1934	15,000
1935	20,000
1936	25,000
1937	30,000
1938	35,000
1939	40,000
1940	45,000
1941	50,000
1942	55,000
1943	60,000
1944	65,000
1945	70,000
1946 and any year thereafter	75,000

8. Of the taxable income received during the period from May 20, 1932, to December 31, 1932, and during the calendar

years 1933 and 1934, respectively, by each of the trusts described in findings 2, 3, and 4, the trustees had on December 31, 1932, December 31, 1933, and December 31, 1934, pursuant to the terms of those trusts accumulated and held for future distribution the following respective amounts:

Trust Described in—	December 31, 1932	December 31, 1933	December 31, 1934
Finding 2 (Elizabeth Kent Van Alen)	$84, 604, 58	[1] $46, 486, 55	[2] $41, 573. 94
Finding 3 (Virginia Tucker Kent)	85, 442. 41	56, 994. 63	56, 056. 98
Finding 4 (A. Atwater Kent, Jr.)	85, 445. 91	56. 045. 33	56, 056. 98
Total	255, 492. 90	159, 526. 51	154, 564. 42

[1] After the payment of $10,000 to Elizabeth Kent Van Alen, pursuant to the terms of the trust referred to in finding 2.
[2] After the payment of $15,000 to Elizabeth Kent Van Alen, pursuant to the terms of the trust referred to in finding 2.

9. The trustees of each of the trusts invested the sums accumulated and held as stated in finding 8, together with the nontaxable income received by them, respectively, during the period mentioned in finding 8 (as stated in Exhibit 5 which is incorporated herein by reference), and continued to hold the accumulated income for the two-year period provided in the trust instruments. On June 30 and December 31, in each of the years 1934, 1935, and 1936, the trustees of each of those trusts paid the accumulations, reduced by the deductions of proper trust expenses set forth in Exhibit 5, to plaintiff in the following amounts:

Date Paid to Plaintiff	From Income Received and Accumulated During Period	Elizabeth Kent Van Alen Trust	Virginia Tucker Kent Trust	A. Atwater Kent, Jr., Trust
6/30/34	5/20/32–6/30/32	$34, 374. 49	$34, 643. 10	$34. 093. 14
12/31/34	7/1/32–12/31/32	35, 038. 48	35, 288. 53	34, 628. 65
Total for 1934		69. 412. 97	69, 931. 63	68, 721. 79
6/30/35	1/1/33–6/30/33	17, 512. 99	26, 018. 19	25, 993. 94
12/31/35	7/1/33–12/31/33	26, 856. 74	26, 688. 28	26, 393. 61
Total for 1935		44, 369. 73	52, 706. 47	52, 387. 55
6/30/36	1/1/34–6/30/34	9, 810. 01	25, 586. 27	20, 552. 24
12/31/36	7/1/34–12/31/34	19, 963. 58	24, 868. 83	19, 609. 44
Total for 1936		29, 773. 59	50, 455. 10	40, 161. 68

10. During the calendar year 1935, the trustees of the trusts described in findings 2, 3, and 4 had no net taxable

income and no payments were made pursuant to the terms of those trusts to Elizabeth Kent Van Alen, Virginia Tucker Kent, or A. Atwater Kent, Jr.

11. On or about March 15, 1933, 1934, and 1935, plaintiff duly filed his individual income tax returns for the calendar years 1932, 1933, and 1934, respectively, and paid the tax shown due on those returns in quarterly installments. Plaintiff did not include in his taxable income for those years any part of the income received and accumulated by the trustees during those years as set out in finding 8. Thereafter, the Commissioner of Internal Revenue duly made additional assessments against plaintiff by including in plaintiff's income for those years the income described in finding 8 as having been accumulated by the trustees on December 31, 1932, 1933, and 1934. After payment of the additional taxes so assessed, plaintiff duly filed claims for refund of those payments which were rejected by the Commissioner. Plaintiff then instituted suit against the appropriate collector in the District Court of the United States for the Eastern District of Pennsylvania, which court found the facts as stipulated by the parties and concluded as a matter of law that the income from the trusts in suit was taxable to the trustees and no part of it was taxable to plaintiff. *Kent* v. *Rothensies, Collector*, 35 Fed. Supp. 291. On appeal the decision of the District Court was reversed. *Kent* v. *Rothensies, Collector*, 120 Fed. (2d) 476. Thereafter, the Supreme Court denied a petition for a writ of certiorari, 314 U. S. 659.

12. Of the taxable income received during the calendar years 1936 and 1937, respectively, by each of the trusts described in findings 2, 3, and 4, the trustees had on December 31, 1936, and December 31, 1937, pursuant to the terms of those trusts, accumulated and held for future distribution the following respective amounts:

Trust Described in—	December 31, 1936	December 31, 1937
Finding 2 (Elizabeth Kent Van Alen)	[1] $14,079.44	[3] $28,180.81
Finding 3 (Virginia Tucker Kent)	28,462.44	[4] 46,944.35
Finding 4 (A. Atwater Kent, Jr.)	[2] 14,117.55	[5] 36,370.02
Total	56,659.43	111,495.18

[1] After the payment of $14,092.13 to Elizabeth Kent Van Alen, pursuant to the terms of the trust referred to in finding 2.

[2] The plaintiff was taxed on only $14,117.55 after the payment of $14,093.38 to A. Atwater Kent, Jr., pursuant to the terms of the trust referred to in finding 4.

[3] After the payment of $28,186.46 to Elizabeth Kent Van Alen, pursuant to the terms of the trust referred to in finding 2.

[4] After the payment of $10,000 to Virginia Tucker Kent, pursuant to the terms of the trust referred to in finding 3.

[5] After the payment of $20,000 to A. Atwater Kent, Jr., pursuant to the terms of the trust referred to in finding 4.

13. The trustees of each of the trusts invested the sums accumulated and held, as stated in finding 12, together with the nontaxable income received by them respectively during the period mentioned in finding 12 (as stated in "Exhibit 9" which is incorporated herein by reference), and continued to hold the accumulated income for the two-year period provided in the trust instruments. On June 30 and December 31 in each of the years 1938 and 1939, the trustees of each of the trusts paid the accumulations, reduced by the deductions of proper trust expenses, set forth in Exhibit 9, to the plaintiff in the following amounts:

Date Paid to Plaintiff	From Income Received and Accumulated During Period	Elizabeth Kent Van Alen Trust	Virginia Tucker Kent Trust	A. Atwater Kent, Jr., Trust
6/30/38	1/1/36–6/30/36	$ 5,113.77	$13,455.43	$7,509.64
12/31/38	7/1/36–12/31/36	6,875.16	12,850.87	6,929.83
Total for 1938		11,988.93	26,306.30	14,439.47
6/30/39	1/1/37–6/30/37	7,317.27	9,986.79	6,863.79
12/31/39	7/1/37–12/31/37	7,532.41	18,407.08	13,666.01
Total for 1939		14,849.68	28,393.87	20,529.80

No part of the accumulations paid to the plaintiff, as set out above, was included by plaintiff in his taxable income for the years 1938 or 1939.

14. On or about February 27, 1937, plaintiff filed his individual income tax return for the calendar year 1936. He did not include in his taxable income for that year any part

of the income received and accumulated by the respective trustees during the calendar year 1936, as stated in finding 12. He duly paid the tax shown due on that return, $52,898.93, in approximately equal installments on or about March 13, June 9, September 11, and December 13, 1937.

Thereafter, and prior to November 23, 1937, the Commissioner made an additional assessment of income taxes against plaintiff for the year 1936 in the amount of $33,909.34, which plaintiff paid November 27, 1937, with interest thereon of $1,342.90.

15. On or about March 2, 1938, plaintiff filed his individual income tax return for the calendar year 1937. He did not include in his taxable income for that year any part of the income received and accumulated by the respective trustees during the calendar year 1937, as stated in finding 12. He duly paid the tax shown due on that return, $57,419.51, in equal installments on March 19, June 15, August 9, and December 14, 1938.

Thereafter, and prior to April 25, 1939, the Commissioner made an additional assessment of income taxes against plaintiff for the year 1937 in the amount of $72,101.37, which plaintiff paid April 28, 1939, with interest thereon of $4,681.65.

16. The additional income taxes assessed and collected, as stated in findings 14 and 15, resulted in part from the inclusion in plaintiff's gross income for the calendar years 1936 and 1937, respectively, of the amounts of income described in finding 12 as having been accumulated and held by the trustees on December 31, 1936, and December 31, 1937. In arriving at those additional assessments for 1936 and 1937, the Commissioner added to plaintiff's gross income for those years the amounts of $56,659.43 and $111,495.15, respectively, as having been accumulated and held by the trustees on December 31, 1936, and December 31, 1937. Those assessments were made within the time allowed by the statute of limitations for making assessments, or within such time as extended by waivers executed by plaintiff.

17. On or about February 7, 1940, and April 15, 1941, plaintiff filed claims for the refund of income taxes and interest for the years 1936 and 1937 in the respective amounts of $37,-

155 and $76,783.02. The Commissioner rejected those claims December 31, 1941.

18. The trustees of the trusts described in findings 2, 3, and 4 duly filed Federal income tax returns for the calendar years 1936 and 1937 and duly paid Federal income taxes for those years at the times and in the amounts and manner prescribed by law on the total amount of taxable income received and accumulated by the respective trustees. The defendant does not admit that that income was taxable to the trustees. The trustees thereafter filed claims for the refund of the taxes so paid in order to protect the interest of each of the trusts in the event it should be held that that income was properly taxable to plaintiff. Those claims for refund have been allowed by the Commissioner and the taxes refunded to the trustees. The dates and amounts of such refunds are as follows:

Name of Trust	Amount	Date
Elizabeth Kent Van Alen	$909.49, with interest of $271.44 for 1936.	3/16/42
	$3,551.58, with interest of $845.71 for 1937.	3/16/42
Virginia Tucker Kent	$3,348.18, with interest of $937.51 for 1936.	4/16/42
	$8,758.95, with interest of $1,925.22 for 1937.	4/16/42
A. Atwater Kent, Jr	$9,616.47, with interest of $268.78 for 1936.	3/16/42
	$5,752.50, with interest of $1,244.73 for 1937.	3/16/42

Similar claims for refund which were filed by the trustees for 1932, 1933, and 1934 were allowed by the Commissioner and refunds on account thereof made to the trustees.

19. At all times mentioned herein the books of account and the income tax returns of plaintiff and each of the trusts described in findings 2, 3, and 4 were kept and were prepared on the cash receipts and disbursements basis.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff claims that he was required to pay $113,938.02 more than he owed for income taxes and interest thereon for the years 1936 and 1937. The Commissioner of Internal Revenue assessed to and collected from the plaintiff taxes on the income of three trusts which the plaintiff had set up

on May 20, 1932. The plaintiff was made a trustee of each of the trusts, and a trust company, a different one for each trust, was named as the other trustee. Since the trusts were similar in their provisions, except that each named a different child of the plaintiff and a different corporate trustee, a description of one of the trusts will bring out the tax question presented by each of them. We therefore describe the Elizabeth Kent Van Alen Trust.

By the trust deed the plaintiff transferred 28,762 shares of stock of the Atwater Kent Manufacturing Company to be held in trust until the death of the survivor of the grantor and his wife and his daughter Elizabeth Kent Van Alen. Out of the net income the trustees were to pay the daughter during her life the yearly sums named in an annexed schedule, which sums began at zero for 1932 and increased $5,000 each year to $75,000 for the year 1946 at which amount they were to remain from that time on. After the death of the daughter they were to pay $10,000 a year for the maintenance and education of, during minority, and thereafter to, each of the daughter's children for life, provided that the total of these payments to the daughter's children in any year should not exceed one-half the net income of the trust for that year. After making the directed payments to the daughter or her children the trustees were, during the life of the grantor, to retain any remaining income of the trust for two years after its receipt, and then disburse the retained amounts on the June 30th or the December 31st which came first after the end of the two-year period of retention of any income (1) not to exceed $5,000 to the daughter or her children as needed to bring the payments to them for the preceding calendar year up to the maximum amounts stated for them for that year; (2) the balance to the plaintiff, if living.

The Commissioner of Internal Revenue, in assessing the disputed tax, and the Government, in this suit, urge that Section 167 (a) (1) of the Revenue Act of 1936 made the retained income taxable to the plaintiff. It provides:

> SEC. 167. INCOME FOR BENEFIT OF GRANTOR.
> (a) Where any part of the income of a trust—
> (1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the dis-

position of such part of the income may be, held or accumulated for future distribution to the grantor;

* * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

The statute seems to fit the provision in the trust deed for the retention of the income and its payment to the plaintiff. The plaintiff urges, however, that it was uncertain whether retained income was being "held or accumulated for future distribution to the grantor" since, under the trust deed, it would not be distributed to him unless he was living at the end of the two year period of retention, and some or possibly all of it might not be distributed to him even if he was alive at the end of the period, since it might have to be used, to the extent of possibly $10,000 in any year, to make up a deficit in the share of the daughter or her children for the preceding year.

These are, without doubt, substantial uncertainties. They present the question whether Section 167 (a) (1) is applicable, in the kind of situation here involved, only when the terms of the trust make it certain that the income whose taxation is in question will be paid to the grantor.

Treasury Regulation 94, promulgated under the Revenue Act of 1936, provides:

> ART. 167–1 *Trusts in the income of which the grantor retains an interest.*
>
> * * * * *
>
> (b) *Test of taxability to the grantor.*—The test of the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether the grantor has failed to divest himself, permanently and definitely, of every right which might, by any possibility, enable him to have the income, at some time, distributed to him, actually or constructively.

This is strong language, and would carry much farther than it is necessary to go to decide this case. But we think that at least the direction in which it points is correct, as an interpretation of the intent of Section 167 (a) (1). In the taxation of incomes, the rate bracket in which they are placed for

tax purposes is vital to the revenues. For one to unburden himself of much of his income tax, by ridding himself, *pro tanto*, of his income, is permissible. But a device by which one seeks to rid himself of much of the tax, by placing the income producing property in several separate trusts, thereby attempting to diminish almost geometrically, because of the elimination of higher surtax rates, the aggregate of income taxes payable on the same amount of income, while at the same time the income finds its way into the same pocket as before, deserves the careful scrutiny of any intelligent taxing system. As the plaintiff set up his trusts, he was, except for the possible deduction of $10,000 noted above, to get the income by surviving the two year period of retention. If, by failing to survive, he did not get it, it was, by the terms of the trust, to go to his wife, or to other natural objects of his bounty, in substantially the manner, when the several concurrently created trusts are considered, that other property which he owned outright would normally go, upon his death. He had, then, as to the income of the property which he had owned completely before he put it in trust, the substance of continued ownership of the income, which substance consisted of (a) the primary right and the probability that the income would actually come into his possession and (2) the arrangement whereby, upon his death, which would keep the income from coming into his possession, it would go largely if not entirely to persons who would, normally, take by inheritance or devise what he owned when he died.

We think that Section 167 (a) (1) intended to tax such income to the grantor. If, as the plaintiff urges, we read into the statute words requiring that the income be held *unconditionally* for future distribution to the grantor, we open the way to the insertion, in trust conveyances, of conditions, of various degrees of likelihood of occurrence, which would have the intent, and frequently the effect, of leaving in a grantor the income which he had before he made the grant, while requiring his less ingenious contemporaries to make up the taxes which he escaped. We do not think that Congress intended that the statute should receive any such construction. If it had so intended, it must have known that the statute was hardly worth its space in the books.

The plaintiff cites *Commissioner* v. *Dean*, 10 Cir. 102 F. (2d) 699, in which it was held that trust income, paid to a beneficiary on January 3 of a given year, was not taxable to him, but to the trust, because during the preceding year in which it was collected by the trustee, the beneficiary had no right to have it paid to him currently, and had no right that it should ever be paid to him unless he was alive on January 3, the end of the administrative year of the trust. That decision followed the express terms of the applicable statute. The beneficiary there was not the grantor, and the income was not, when received, currently payable to him. It was, therefore, taxable to the trust. The different treatment given by the statutes to the grantor as beneficiary of his own trust, and other persons as beneficiaries, is natural. The *status quo*, when the grantor sets out to create a trust, is that he owns the property, is entitled to its income, and is liable for taxes on that income. The trust device has been used for centuries not only for proper purposes, but, on occasion, to create appearances which do not correspond with the substance of ownership, in order to defeat some policy of the state. When, therefore, the grantor makes himself a beneficiary of a trust of his own creation, the law must be astute to see whether not only the appearance of things, but their substance, has been changed by the creation of the trust. It takes note of the *status quo ante* the trust, i. e., that the now beneficiary was then the complete owner. If, as in our case, it finds that after the creation of the trust he is still the one who has the primary right to enjoy the fruits of ownership, it may think it necessary to disregard the change in legal title in order to prevent some policy of the law from being nullified by a legal device. For example, one can, in most states, create a spendthrift trust for one other than himself. But when one attempts to put his own property in trust so that he may have its income to enjoy, but not to pay his debts with, the law forbids, and allows the creditors to take the property in spite of the trust. We think that Section 167 (a) (1) has something of the same purpose; that one should not, by means of a trust, succeed in ridding himself of his income taxes while keeping his income. We see nothing in this statutory purpose which should cause us to give the statute a narrow construction.

The Government has urged other reasons why the plaintiff should not recover on the merits of the case, but we do not find it necessary to discuss them. The Government also vigorously contends that because, as shown in the findings, the Circuit Court of Appeals for the Third Circuit in the case of *Kent* v. *Rothensies*, 120 F. (2d) 476, held that the plaintiff was liable, under the same trusts here involved, for the retained income of the trusts for the years 1932, 1933, and 1934, the question is now *res adjudicata* and we are bound to decide the case for the Government, regardless of our views as to its merits. However, since we agree with the cited decision on its merits, we prefer not to consider the *res adjudicata* question. Cf. *Engineers' Club of Philadelphia* v. *United States*, 95 C. Cls. 42, certiorari denied, 316 U. S. 700.

The petition will be dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, concurring:

I concur both for the reasons stated and for the reason that in my opinion the decision of the 3rd Circuit Court of Appeals in *Kent* v. *Rothensies*, 120 F. (2d) 476, is *res adjudicata.*

JONES, *Judge*, took no part in the decision of this case.

MARGARET W. GALBREATH HENDRICKSON, FORMERLY MARGARET W. GALBREATH v. THE UNITED STATES

[No. 45886. Decided March 5, 1945]

On the Proofs

Income tax; exclusion from gross income of refund of A. A. A. processing taxes acquired by purchase and inheritance of partnership interests.—Where a refund of AAA processing taxes was made by the processor to a partnership business which had paid the taxes in previous years; and where the business was now solely owned by the widow of one of the partners by way of inheritance from her husband and purchase of the interest of another partner and of the inherited interest of her daughter; it is *held* that

the refund although retained in whole by the widow, plaintiff, was not income to her, inasmuch as three-eighths of the amount was received by way of inheritance and five-eighths by purchase of partnership interests, and plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Geo. E. H. Goodner for the plaintiff. *Mr. Scott P. Crampton* was on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff, Margaret W. Galbreath Hendrickson, formerly Margaret W. Galbreath, is an individual and a resident of Greenville, Tennessee. Prior to and on June 11, 1936, she was the wife of Hugh J. Galbreath, and after his death intestate on that date she became administratrix of his estate.

2. Prior to June 11, 1936, Hugh J. Galbreath and W. C. Thomas, as partners, operated a bakery business in Morristown, Tennessee, under the name of "Galbreath's Bakery", with a branch in Greenville, Tennessee, Galbreath owning a three-fourths interest and Thomas a one-fourth interest therein. During 1935 that partnership purchased flour from various flour mills; the price paid therefor included the processing taxes which the millers had paid on the processing of the wheat from which the flour was made and had added to the sale price of the flour.

3. Upon the death of Hugh J. Galbreath intestate on June 11, 1936, the partnership terminated and, under the laws of Tennessee, his three-fourths interest therein passed one-half to his widow and one-half to his minor daughter. October 2, 1936, the Chancery Court for Greene County, Tennessee, entered an order approving the purchase by plaintiff of the three-eighths interest of the minor daughter in the partnership as of June 11, 1936. Plaintiff, now owning a three-fourths interest in the bakery, and Thomas, continuing to own a one-fourth interest, operated the bakery as partners from June 12, 1936 to November 30, 1936. During that period

Thomas managed the business for the partnership. The amount paid by plaintiff for the daughter's interest was $14,667.20, and the order of the Chancery Court approving the purchase stated that this was the full book value of the interest of the minor in the partnership as of June 11, 1936. The court further found that the total assets of the partnership on June 11, 1936, were $84,259.33, and that its liabilities were $45,146.79, thus leaving a net worth of $39,112.54. The amount of $14,667.20 was duly paid by plaintiff to the guardian of the daughter. The balance sheet filed by the original parnership with its partnership return of income for the period January 1 to June 11, 1936, showed a net worth of the partnership at June 11, 1936, of $44,506.39. No mention was made in the appraisal by the court or in the balance sheet, referred to above, of the processing tax item described in finding 5.

4. November 30, 1936, plaintiff purchased the one-fourth interest of Thomas in the bakery business. The contract of sale recited that Thomas assigned all of his interest in and to the business known as "Galbreath's Bakery" to plaintiff in consideration of the payment to him of $4,000 in cash and the cancellation of $4,500 due on a note of Thomas, of which plaintiff was the owner. The balance sheet filed by the second partnership with its partnership return of income for the period June 12 to November 30, 1936, showed a net worth of the partnership at November 30, 1936, of $47,609.76. No mention was made in the bill of sale or in the balance sheet, referred to above, of the processing tax item described in finding 5. Since that time plaintiff has operated the bakery business as a sole proprietorship. During the entire period, both prior and subsequent to June 11, 1936, the business has been operated as "Galbreath's Bakery."

5. In 1937 the millers who in 1935 had sold flour to the partnership of Hugh J. Galbreath and Thomas, doing business as Galbreath's Bakery, refunded to Galbreath's Bakery the sum of $3,575.16, representing the processing taxes which were included in the prices paid by the partnership for the flour purchased by it from the mills. This amount was received by plaintiff, who was then the sole owner of Galbreath's Bakery, and has ever since been retained by her.

6. In the federal estate tax return filed for the estate of Hugh J. Galbreath, deceased, no amount was included as an asset for the item of $3,575.16, referred to in the preceding finding. No claim for such amount was ever set up on the books of the first partnership, which terminated June 11, 1936, on the books of the second partnership which terminated November 30, 1936, or on the books of plaintiff.

7. March 14, 1938, plaintiff filed her individual income tax return for the calendar year 1937 reporting a net income of $19,427.33 and a tax due of $1,483.46, which was paid on that date. Included in the gross income in that return under the designation "other income" was the item of $3,575.16 referred to in finding 5 and described in the return as "Refund—processing tax $3,575.16." An additional tax of $45.56 and interest thereon in the amount of $1.27 were paid by plaintiff on September 28, 1938.

8. February 26, 1940, plaintiff filed a claim for refund for 1937 of $461.20, or such greater amount as might be refundable. The following grounds were assigned therefor:

> There was included in gross income in said return the sum of $3,575.16 as "refund of processing taxes." This was done in error because taxpayer was not in business during the time the Agricultural Adjustment Act was in effect and did not pay any processing taxes. Therefore, she could not possibly have had such a refund.
>
> Taxpayer's husband (now deceased) and one W. C. Thomas were operating Galbreath's Bakery as a partnership while the Agricultural Adjustment Act was in effect, Mr. Galbreath having a three-fourths interest and Mr. Thomas a one-fourth interest. They did not pay any processing taxes as such, but had contracts with their vendors to the effect that, if the Agricultural Adjustment Act should be held invalid, the vendors would refund the processing taxes which they had included in the prices at which they sold flour to the partnership. Mr. Galbreath died June 11, 1936, leaving taxpayer and a daughter as his sole heirs. Taxpayer purchased the daughter's interest in said processing tax claims at face value and thus became the owner, at face value, of a three-fourths interest in said claims. On November 30, 1936, taxpayer purchased the one-fourth interest of Mr. Thomas in said claim paying therefor the face value of them. Thereafter, taxpayer received payment of the claims thus acquired—the amount received in 1937 being

> $3,575.16, which amount was included in income as stated above. Said payment did not constitute income to taxpayer.

The statement in plaintiff's claim for refund, just quoted, that her husband and Thomas had contracts with their vendors to the effect that, if the Agricultural Adjustment Act should be held invalid, the vendors would refund the processing taxes to them, was not true.

9. January 13, 1941, the Commissioner of Internal Revenue advised plaintiff of his determination of an adjusted net income of $21,232.74 for 1937, and of a deficiency against her of $293.66 for that year. The adjusted net income included the processing tax item of $3,575.16, heretofore referred to, and the letter set out the following action on the claim for refund filed February 26, 1940:

> The contention set out in your claim for refund that the refund of processing taxes which was included in income reported on the return is not income is disallowed in that the amount reported in 1937 had no cost basis to you.

Plaintiff paid that deficiency May 15, 1941, together with interest and penalty thereon in the amount of $55.15, making a total payment on that date of $348.81. The claim for refund was formally rejected by the Commissioner by letter dated June 17, 1941.

10. August 1, 1941, the Commissioner advised plaintiff of his determination of a deficiency in unjust enrichment taxes for the years 1936 and 1937 in the amount of $3,962.81. The part of that deficiency for the year 1937 resulted from the inclusion in income subject to that tax of the amount of $3,575.16 representing reimbursements of processing taxes made by vendors to plaintiff and described in finding 5. In computing the unjust enrichment tax, the net income of plaintiff for 1937 of $19,427.33, as reported in her return under Title I of the Revenue Act of 1936, was reduced by the amount of income included therein which was subject to the unjust enrichment tax imposed by Title III of the Revenue Act of 1936, that is, $3,575.16. That computation showed an income tax for 1937 of $1,021.58 instead of $1,483.46 as shown by plaintiff in her return; that is, a difference of $461.88.

The unjust enrichment tax was then computed in the following manner:

Unjust enrichment tax

Net income adjusted	$3,575.16
Tax on $3,575.16 at 80 percent	2,860.13
Less credit for other taxes on income	461.88
Unjust enrichment tax assessable	2,398.25
Unjust enrichment tax assessed: Original return	None
Deficiency of unjust enrichment tax	2,398.25
Penalty, 25 percent of $2,398.25	599.56

Plaintiff appealed to the Tax Court of the United States from the Commissioner's determination as set out in his letter of August 1, 1941, and the Tax Court decided, on October 23, 1944, that plaintiff was not liable, in any capacity, for any unjust enrichment tax. See *Margaret W. Galbreath Hendrickson* v. *Commissioner of Internal Revenue*, 4 T. C. 231. This decision has now become final.

11. Plaintiff is the owner of the claim herein sued upon and no assignment of any part thereof has been made.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover income taxes resulting from the inclusion within her gross income of $3,575.16, refunds of processing taxes which had been collected from Galbreath's Bakery by the flour mills from which it had purchased flour in 1935.

After the Agricultural Adjustment Act had been declared unconstitutional, under which Act these processing taxes had been levied, the flour mills refunded to "Galbreath's Bakery" the amount of the taxes which they had included in the price of the flour sold to that bakery. This sum was received by plaintiff in 1937 in the way to be set out and was included by her in her income for that year, on which taxes were paid, but later she filed a claim for refund of these taxes on the ground that these refunds were not income to her in that year or in any other year.

In the year 1935, when the mills sold the flour to Galbreath's Bakery, in the purchase price of which there was included the processing taxes, the bakery was operated by a partnership composed of Hugh J. Galbreath, the former husband of plaintiff, and W. C. Thomas. On June 11, 1936, Galbreath died leaving no will. Under the law of Tennessee, where he resided, one-half of his estate passed to his widow and one-half to his minor daughter. He owned a three-fourths interest in the bakery, so, on his death plaintiff and his daughter each succeeded to a three-eighths interest therein. Subsequently, on October 2, 1936, plaintiff bought from her daughter her interest in the bakery for the sum of $14,667.20, which was the book value of the daughter's interest, and then on November 30, 1936, plaintiff purchased Thomas' one-fourth interest. Thereafter, plaintiff was the sole owner.

When the flour mills made the refunds of processing taxes collected by them from Galbreath's Bakery checks were issued by them in the name of Galbreath's Bakery. These checks were cashed by plaintiff and she has ever since retained the proceeds thereof.

When the mills made the refunds to the bakery they were making them to the persons from whom they had collected the processing taxes, to wit, the partnership of Galbreath and Thomas. When they were received by plaintiff she had a right to keep them only because she was an heir of her husband, one of the partners to whom the refunds were made, and because she was the purchaser of the interest in the business of her daughter and of Thomas. The mills owed nothing to anyone other than the partnership. They owed plaintiff nothing except as the successor in interest of the partners.

Three-eighths of the refunds received by her, then, she received by inheritance from her husband. Such receipts are expressly excluded by the Act from gross income. The inclusion in her gross income of so much of the refunds, at least, was wholly without justification.

The other five-eighths of the refunds plaintiff had a right to retain only by virtue of her purchase of her daughter's

interest in the business and of Thomas' interest. She had no other right to it.

We think there can be no doubt that when plaintiff's daughter and Thomas sold to plaintiff their interests in the business they sold to her whatever right they had to receive a part of these refunds. The terms of their sales made no reservation of any asset of the business. Their entire interest was sold. This is evidenced by the fact that neither the daughter nor Thomas ever made any claim to any part of the refunds, or if they did, that they were unable to successfully maintain it.

Whether or not the partnership of Galbreath and Thomas had a legally enforceable right to a refund of the money from the flour mills, it nevertheless became, when paid, an asset of that partnership, and only those persons were entitled to keep the money who had succeeded to the interest of the partners. This person was the plaintiff, partly by inheritance from her husband and partly by purchase from her daughter and from Thomas.

We are of opinion that plaintiff is entitled to recover the amount of taxes paid as the result of the inclusion of these refunds within her gross income. Judgment is reserved until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report of a commissioner, showing the amount due plaintiff computed in conformity with this opinion. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

The original owners of the bakery, Hugh J. Galbreath and Thomas, paid to the millers, their vendors, processing taxes upon the flour which they bought in 1935; they, so far as appears, collected the amount so paid from their customers in increased prices;[1] in 1936 the plaintiff became the owner of the bakery; in 1937 the millers sent payments to Galbreath's Bakery, which was the trade name of the enterprise throughout the entire period; the plaintiff appropriated the money.

[1] See *Hendrickson* v. *Commissioner*, 4 T. C. 231 at 236–7.

The question is whether or not it was taxable income to her. I think it was.

The statutory definition of taxable income consists of a "general definition"[2] of gross income, a list of specific exclusions from gross income[3], and a list of permissible deductions from gross income in computing the tax.[4] The "general definition," shown in the footnote, is very broad, using the words "and income derived from any source whatever." This language easily includes the money here in question. When we look to the "exclusions from gross income" in section 22 (b), paragraph (3) excluding "the value of property acquired by gift, bequest, devise, or inheritance" is the only provision with possible relevance. The plaintiff does not claim that any right to this money came to her by inheritance from her husband. She concedes that there was no contract for it or right to collect it in her husband and his partner. She does claim, however, that the money came to her by "gift" from the millers and is therefore excluded from taxable income by section 22 (b) (3).

The plaintiff was a legal stranger to the millers, as far as the purchases of the flour on which the processing taxes were paid, were concerned. She just happened to own the same physical plant and business which her husband and Thomas had owned when they bought and used the flour. If they had had a legal right to a refund of the taxes, that right might have, probably would have, passed to the plaintiff by the inheritance and the assignments by which the business became hers. But the mere chance or prospect that, at the will of the millers, the taxes would be refunded, would not have passed to her by inheritance, nor by assignment in the absence of an intent to include such a chance or prospect. The evidence here negatives any such intent. So the plaintiff

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[2] Revenue Act of 1936, Section 22. Gross Income.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

[3] *Id.* Section 22 (b) (1)–(8).

[4] *Id.* Section 23.

acquired by succession or assignment no interest in these refunds of taxes, and was, as I have said, a legal stranger to them. See *Hendrickson* v. *Commissioner*, *supra*. The plaintiff in her reply brief concedes this.

The millers, I suppose, intended to pay the taxes back to the persons from whom they had collected them. It would be remarkable if their only anxiety was to disgorge them, without regard to the question of who received them. If their intent was as I have supposed, they sent the money to "Galbreath's Bakery" upon the assumption that its owners, corporate or personal, were the ones who had paid them the money which they were now refunding. They could hardly have supposed that they could escape liability for the unjust enrichment tax themselves merely by donating to charity or to a stranger the amount of the processing taxes which they had collected from Hugh J. Galbreath and Thomas.

But when the payments arrived, addressed to "Galbreath's Bakery", the plaintiff was the one to whom they were delivered, since her business bore that name. She took the payments and appropriated them. So far as appears, she did not question the millers as to whether the payments were meant for her, or had merely come into her hands because of their erroneous assumption that "Galbreath's Bakery" was still owned by the person or persons who had paid the taxes. If my supposition as to what happened is correct, the plaintiff was not the recipient of a "gift." If the transaction was intended by the millers as a gift to anyone, or if it would properly be classified as a gift if it had been received by the person intended, it still would not be a gift to the plaintiff, for whom it was not intended. If one sends a check for a Christmas present to his friend John Smith at a stated address, but the friend has died and another John Smith lives at the address and he receives and cashes the check, he cannot, we suppose, omit it from his income tax return as a gift. It was intended as a gift, but not to the one who got it. As to him, it is "income derived from any source whatever", and nothing elsewhere in the statutes excludes it from taxability. I think, therefore, that the plaintiff came into this money because her enterprise happened to bear the same name as it

bore when the former owners who had paid the taxes to the millers operated it. If so, it was taxable income to her.

If the intention of the millers was not what I have inferred; if they wished only to pay out the money, without regard to who got it; or if they were intending to buy the good will of the present owner of the business at an 80% discount, rather than to restore the money to the persons from whom they had collected it, or their representatives, who would have included the heirs of Thomas and the minor daughter of Hugh J. Galbreath; the plaintiff should have come forward with evidence of such intentions. If the intention to purchase good will for the future had been shown, we would have had an interesting question as to whether the transaction was a gift, excluded from taxation. According to *Sportwear Hosiery Mills* v. *Commissioner*, 3 Cir., 129 F. 2d 376, it would not have been a gift, and would have been taxable. But perhaps the decision in *Helvering* v. *American Dental Company*, 318 U. S. 322, points the other way. The court has not, as I understand it, considered this question, since we have no evidence as to what the millers' actual intent was. In this discussion, I have been obliged to infer their intent from the somewhat meager facts and circumstances proved.

The court's opinion awards the plaintiff a judgment upon a theory which the plaintiff herself expressly disclaims in her reply brief. I think the decision is wrong.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the opinion of the court, upon a stipulation filed by the parties showing the amount due thereunder, and upon plaintiff's motion for judgment; it was ordered May 7, 1945, that judgment for the plaintiff be entered in the sum of $587.65, with interest on the amount of $348.81 from May 15, 1941, interest on the amount of $46.83 from September 28, 1938, and interest on the balance of $192.01 from March 14, 1938.

ROY W. DRIER v. THE UNITED STATES

[No. 45601. Decided April 2, 1945]

On the Proofs

Pay and allowances, Navy Officer with dependent mother.—Following the decisions in *Mumma* v. *United States*, 99 C. Cls. 261, and *Herrick* v. *United States*, 100 C. Cls. 308, where the facts in the instant case are not in dispute and show conclusively that plaintiff's mother was dependent on him for her chief support, it is *held* that plaintiff, a Lieutenant Commander, U. S. Navy, is entitled to recover rental and subsistence allowance for the period from October 1, 1941, to March 1, 1943.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant

The court made special findings of fact as follows:

1. Plaintiff entered the United States Naval Service the latter part of September 1941 and was ordered to active duty at that time. He was commissioned a Lieutenant Commander in Ordnance in the United States Navy. This suit is to recover rental and subsistence allowances on account of a dependent mother from October 1, 1941 to March 1, 1943.

2. Plaintiff's mother, Mrs. Winifred Ward Drier, was born on April 2, 1874. She resides at 319 Eighth Street, Calumet, Michigan. She has one other child besides the plaintiff, a son, Charles H. Drier, born October 17, 1899. This son became employed in May 1942 at a monthly salary of $105.00. Prior to the time plaintiff entered the Navy both sons resided with their mother at the above address.

3. Plaintiff's mother and father separated in 1924. Neither spouse took any legal action for divorce or otherwise, and during the period they lived apart he made no contribution to the support of his wife. The father died on May 29, 1942. During the period of this suit he was unemployed. The estate of the father consisted of a home and lot and about $12,000 in cash. Except for several small bequests, each of $25.00, his estate was distributed pursuant to the terms of

his will in the following manner: (1) To Mrs. Julia Chellew the house and lot and $2,000; (2) to his widow, mother of the plaintiff, $3,080, and (3) to the plaintiff and his brother, Charles, $3,080 each. Plaintiff's mother received her share in March 1943 and placed most of it in a savings account. Plaintiff deposited part of his share in the joint account with his mother.

4. From 1927 to date the plaintiff has deposited his salary in a joint account with his mother. The mother draws upon and pays from this account all of her living expenses, amounting to about $100 a month. Except for the $35 a month which her son, Charles, has paid for board from May 1942, the mother has had no other source of income. Plaintiff's mother owned no real or personal property from which she derived any income. Her living expenses have amounted to about $100 a month, as follows: Rent—$15; Fuel—$22; light—$6; telephone—$3; laundry—$6; clothes—$5; food—$35; miscellaneous—$10. Her son Charles assists in the marketing and attends the furnace.

5. Plaintiff was not assigned public quarters while he was serving on active duty from October 1, 1941 to March 1, 1943. During this period he was paid rental and subsistence allowances authorized for an officer without dependents. He has been paid such allowances authorized for an officer with a dependent mother subsequent to said period.

The court decided that the plaintiff was entitled to recover in an opinion *per curiam*, as follows:

Per Curiam: The facts in this case are not in dispute and show conclusively that plaintiff's mother was dependent upon him for her chief support during the period involved. Plaintiff is entitled to recover. Entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due in accordance with the foregoing special findings of facts and the opinion. *Mumma* v. *United States*, 99 C. Cls. 261; *Herrick* v. *United States*, 100 C. Cls. 308.

Upon a report from the General Accounting Office showing the amount due plaintiff in accordance with the above

opinion to be $1,128.80, and upon plaintiff's motion for judgment, it was ordered June 4, 1945, that judgment be entered for the plaintiff in the sum of $1,128.80.

THE WARM SPRINGS TRIBE OF INDIANS OF OREGON v. THE UNITED STATES

[No. M-112. Decided May 7, 1945]

On the Proofs

Indian lands; determination of value of tribal lands taken; offsets for gratuities.—Following the opinion of the court in this case (95 C. Cls. 23) it is *held:*

1. That the acreage taken on the north of the Indian reservation was 64,086 acres, and the acreage taken on the west of the reservation was 14,525 acres.

2. That as of the date of taking, 1894, of the 64,086 acres on the north of the reservation, the valuation of 20,810 acres was $2.50 per acre, or $52,025.00 and the valuation of the remaining 43,276 acres was 50 cents per acre, or $21,638.00, a total of $73,663.00.

3. That as of the date of the taking, 1911, of the 14,525 acres on the west of the reservation, the valuation thereof was 50 cents per acre, or $7,262.50.

4. That the plaintiff is accordingly entitled to recover $80,-925.50, together with interest at 4 percent on $73,663.00 from June 6, 1894, and on $7,262.50 from July 1, 1911, or a total of $241,084.56 as the present full equivalent of the lands on the dates they were taken. *Seminole Nation* v. *United States*, 102 C. Cls. 565.

5. That the amount of $252,089.72 expended for "care and protection of Indian timber lands," which is set out in the report of the General Accounting Office, was not required by treaty or other agreement with plaintiff, and was therefore a gratuity under the terms of the Jurisdictional Act (46 Stat. 1033), entitling the defendant to offsets for "gratuities, if any, paid to or expended for" the plaintiff.

6. Against the sum, $241,084.56, which the plaintiff is entitled to recover for the taking of its lands, there is set off an equal amount of the item, $252,089.72, for care and protection of timber lands, and plaintiff's petition is accordingly dismissed.

7. The Court does not pass upon defendant's claims for other gratuities. *Seminole Nation* v. *United States* (No. L-51), 316 U. S. 286; *Seminole Nation* v. *United States* (No. L-208), 316 U. S. 310.

The Reporter's statement of the case:

Mr. F. M. Goodwin for the plaintiff. *Mr. Ernest L. Wilkinson* was on the briefs.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows:

1. The land now involved in this suit consists of an area containing 64,086 acres lying along the north side of the Warm Springs Reservation and an area containing 14,525 acres lying along the west side of said reservation, a total of 78,611 acres.

Of the entire 78,611 acres involved in this suit, 61,360 acres are now National Forest land and 17,251 acres are in private ownership by patents from the defendant. The patented land is in the 64,086 acres along the north side of the reservation. Of this acreage 3672.58 acres were patented under the Timber and Stone Act (20 Stat. 89) between November 18, 1897, and June 6, 1932. The price paid for such land was $2.50 per acre.

2. The 64,086 acres along the north side of the reservation were expropriated by the defendant in the year 1894, and the parties are agreed that the 14,525 acres along the western side were expropriated by the defendant in the year 1911.

3. The 64,086 acres along the north side of the reservation had on them in the year 1894 standing timber which was sound and matured and could have been cut into lumber substantially as follows:

	Board feet
Ponderosa pine	144, 402, 000
Douglas fir, noble fir, white pine, white fir, larch and Engleman spruce	370, 158, 000
Hemlock, mountain hemlock, Pacific fir, Alpine fir, yellow cedar and other species	108, 676, 000
Total	623, 236, 000

The Ponderosa pine was the most valuable species of timber of all the species on the land involved, and it covered 15,810 acres of the 64,086 acres along the north side of the reservation. There was an additional 5,000 acres in the 64,086 acres along the north side in which Ponderosa pine

greatly predominated and this 5,000 acres was as valuable as the 15,810 acres. The timber on this 64,086 acres was from 75 to 400 or more years of age in 1894.

4. The 14,525 acres along the west side of the reservation had on it in the year 1911 standing timber which was sound and matured and could have been cut into lumber substantially as follows:

	Board feet
Douglas fir and related species	62,830,000
Hemlock and related species	11,000,000
Total	73,830,000

This timber was from 75 to 400 or more years of age in 1911.

5. In 1894 and in 1911 there were parts of the 64,086 acres and of the 14,525 acres, respectively, that contained areas in which there were good hunting, fishing, and berry picking (particularly huckleberries), good grazing (particularly sheep grazing), and some areas adaptable to agricultural purposes.

6. In 1894 there was no railroad or other means of transporting logs or lumber from the 64,086 acres along the northern side of the reservation and the first railroad that could have served that section was not constructed and put into operation until the latter part of the year 1911. It extended down and along the Deschutes River, but was too far away to serve the 14,525 acres along the western side of the reservation which is still without adequate transportation for logs or lumber. There was no immediate market for logs or lumber from the areas involved in 1894 or 1911, respectively, or for the land itself, but the land was useful to the Indians and of course had value for future use, including timber operations on it.

7. In 1894 the 15,810 acres covered by Ponderosa pine and the 5,000 acres preponderantly covered by Ponderosa pine, both within the 64,086 acres along the north side of the reservation, had a value of $2.50 per acre. The remaining 43,276 acres on the north of the reservation had a value in 1894 of fifty cents an acre. The total value of the lands on the north which were taken by defendant was $73,663.00.

Included in the land on the north were from 12,000 to 13,000 acres of land, upon which there was but little timber. These lands were good for pasture lands, but only a negligible part thereof was fit for cultivation. It is included in the acreage outside of that covered by the Ponderosa pine, which is valued at fifty cents an acre.

8. In 1911 the 14,525 acres along the west side of the reservation had a value of fifty cents an acre, making a total of $7,262.50.

9. From 1910 to 1930 the defendant spent gratuitously for the benefit of the plaintiff the sum of $252,089.72 for the care and protection of their timber lands.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is now before the court on the question of the value of the lands which we held the defendant took from plaintiff (95 C. Cls. 23) and the amount of the offsets to which the defendant is entitled.

The commissioner has found, pursuant to agreement between the parties, that the amount taken was 64,086 acres on the north of the reservation and 14,525 acres on the west. All of the acreage on the west and all but 17,251 acres on the north have been incorporated within national forests. Of the 17,251 acres on the north 3,672.58 acres thereof were patented under the Timber and Stone Act (20 Stat. 89) between November 18, 1897 and June 6, 1932; 715.86 acres in isolated tracts, not coming under the Timber and Stone Act, were disposed of at various dates from 1921 to 1932, and the balance are homestead acres, or have been otherwise disposed of for considerations other than cash.

We held in our former opinion that the acreage on the north was appropriated by the defendant in 1894. All of it, except for 12,000 or 13,000 acres, was timber land. Of the timber land about 20,810 acres consisted of Ponderosa pine, which was the most valuable for timber purposes. The balance was Douglas fir and hemlock and related species.

Except for 12,000 or 13,000 acres, the land had no value

except for the timber on it. When it was taken, this timber had no present value, but only a speculative one, because there was no railroad or other means of transporting the logs or lumber from the tract, and because there were millions of acres of similar undeveloped timber lands in this vicinity and in other mountainous sections on the West coast. All the witnesses both for plaintiff and defendant testified that the timber at the time it was taken had only "a nominal or speculative value;" and that it had no market value "in the sense that there were willing buyers and willing sellers."

On June 3, 1878 Congress passed the Timber and Stone Act, *supra*, authorizing the sale of timber lands in the States of California, Oregon, Washington, and Nevada at a minimum price of \$2.50 per acre, but no lands in the vicinity of the tract taken from plaintiff by the defendant were sold under this Act until November 18, 1897, about three years after the taking, when 32.70 acres were sold. The next sale was about 18 months later, on April 20, 1899, when 40 acres were sold. Between November 18, 1897, and June 6, 1932, a period of thirty-five years, only 3,672.58 acres had been sold.

The price of \$2.50 per acre applied to any lands coming within the terms of the Act, and, so, any buyer contemplating the purchase of lands at this price would, of course, select the best lands that could be found. It follows that the best of the lands in this tract could not have had a value of more than \$2.50 per acre. We seriously doubt that any of it had so great a value in 1894. However, the witness upon whose testimony defendant chiefly relies, one Julian E. Rothery, after having testified that this land in 1894 had only a nominal or speculative value, nevertheless fixed this nominal or speculative value for the 20,810 acres covered by Ponderosa pine at a maximum of \$2.50 per acre. The balance of the land, both that covered with timber and the part not covered with timber, he valued at fifty cents an acre. The land not covered with timber was good pasture land, but too stony and steep for cultivation, except for a negligible part.

This valuation we regard as quite liberal, but we accept it because it is the testimony of a witness introduced by and, therefore, vouched for by defendant.

This gives a value of $52,025.00 for the acreage covered by Ponderosa pine, and $21,638.00 for the balance, or a total of $73,663.00 for all the acreage taken on the north of the reservation.

Plaintiff's witness, Mason, places a higher value on the lands, but his testimony is based on a false premise. He ascertained what he thought was the value of the land at the time he testified and then, to get the 1894 value, he discounted this at six percent per annum. This, of course, is purely theoretical and is contrary to his own testimony that there was no market value for the lands in 1894, in the sense of a willing seller and a willing buyer. It is, of course, the value at the time of the taking that must be paid in order to give just compensation for the taking. *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 339–340. Cf. *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155.

The land on the western part of the tract was covered by Douglas fir and hemlock and related species. One of defendant's witnesses says that this land was entirely valueless, another one said that it had "only a negligible value." It was on the top of the Cascade Range of mountains, remote from any means of transportation. However, Rothery placed a valuation on it of fifty cents an acre. We are sure it had no greater value, but, again, we accept the opinion of defendant's witness, and place upon it this valuation of fifty cents an acre, or a total value for the 14,525 acres of $7,262.50.

This is a total of $80,925.50 for the entire acreage appropriated by the defendant. Plaintiff is entitled to recover this amount from defendant, plus 4 percent interest on $73,663.00 from June 6, 1894, and on $7,262.50 from July 1, 1911, in order to give the plaintiff the present full equivalent of the value of the lands on the date they were taken. *Seminole Nation* v. *United States*, 102 C. Cls. 565. This totals $241,084.56.

Against this amount defendant claims offsets for gratuities totaling $2,622,660.41, as set out in the report of the General Accounting Office filed in this case.

Under the terms of the Jurisdictional Act defendant is entitled to an offset for "gratuities, if any, paid to or

expended for said Indian tribe or bands or either of them." Among the items set out in the report of the General Accounting Office is one of $252,089.72 for "care and protection of Indian timber lands." This expenditure was not required by treaty or other agreement with plaintiff and was a pure gratuity. We have held that plaintiff is entitled to $241,084.56 for the taking of their lands. Against this sum an equal amount of the item for care and protection of Indian timber lands will be offset.

We do not pass upon defendant's claim for other gratuities. *Seminole Nation* v. *United States*, 316 U. S. 286; *Seminole Nation* v. *United States*, 316 U. S. 310.

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE NATIONAL BANK OF MONTICELLO, ILLINOIS, AS CONSERVATOR FOR HERBERT E. WASCHER, AN INCOMPETENT PERSON v. THE UNITED STATES

[No. 45858. Decided May 7, 1945]

On the Proofs

Suit for travel and subsistence expenses; statute of limitation under Title 28, U. S. Code, section 262; insanity.—Where plaintiff, an employe of the Veterans' Bureau (later Veterans' Administration) during the period from September 20, 1921, to and including August 21, 1923, performed travel duty pursuant to proper travel orders, but submitted no claim for transportation or subsistence expenses until September 9, 1931, which was more than 6 years after the last travel had been performed in 1923; and where plaintiff's petition in the instant suit was filed in the Court of Claims April 23, 1943; it is *held* that the suit is barred by the statute of limitations, U. S. Code, Title 28, section 262.

Same.—Where it is not established by the evidence that plaintiff was insane or incompetent during the period of his employment in the Veterans' Bureau, or from the time of his resigna-

tion therefrom until March 26, 1932; it is *held* that the suit is not timely under the provision of section 262 of Title 28, U. S. Code, that claims of insane persons shall not be barred if the petition be filed in the court within three years after the disability has ceased.

Same; burden of proving insanity.—The burden of proving insanity is on the person alleging it.

Same.—It is presumed in law that all men are sane, and the presumption continues until a finding is made to the contrary.

The Reporter's statement of the case:

Mr. C. L. Dawson for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Herbert F. Wascher is an individual and a veteran of World War I. As will hereinafter appear, during the period from September 20, 1921, to and including August 21, 1923, he was employed by the United States Veterans Bureau, which by executive order of July 21, 1930, became and was thereafter known as the United States Veterans Administration. March 26, 1932, the County Court of Champaign County, State of Illinois, appointed August C. Wascher conservator of the person and property of Herbert F. Wascher and this suit was begun April 23, 1943, with the plaintiff shown as "August C. Wascher, as conservator for Herbert F. Wascher, an incompetent person." July 10, 1944, a motion was allowed by this Court for the substitution of The National Bank of Monticello, Illinois, for August C. Wascher, on account of August C. Wascher's death. For convenience, Herbert F. Wascher is hereinafter referred to as the "plaintiff."

2. Plaintiff was employed as a training assistant by the United States Veterans Bureau at Chicago, Illinois, from September 20, 1921, to and including August 21, 1923, at a salary of $2,000 per annum. During that period, his duties required him to travel from the office where he was stationed to various points within the territory covered by the regional office of the Veterans Bureau at Chicago for the purpose of keeping in touch with and supervising trainees (veterans of

World War I) who were in vocational placement training in various places in that area. He was required to visit some of them at least every two weeks and others about once each month.

3. In order to carry out the travel required of him, plaintiff duly made request for and received travel orders for the official trips made by him during the period of his employment. During the period January 23, 1922, to July 20, 1923, 158 travel orders were issued to him similar to a travel order of January 18, 1922, which reads as follows:

> From: District Manager, District #8,
> U. S. Veterans' Bureau
> To: H. F. Wascher
> Chicago, Ill.
>
> SIR: In accordance with provisions of Field Order #34, U. S. Veterans Bureau dated November 22, 1921, you are directed to proceed on or after January 19th, 1922, from Chicago, Illinois, to Mooseheart, Illinois, via Aurora, Illinois, for the purpose of supervising men in training at Mooseheart Institute, on official business for the U. S. Veterans' Bureau. Upon completion of your duties you will return to your official station.
>
> While away from your station your usual and necessary transportation expenses and expenses actually incurred for subsistence not to exceed $5.00 per day, will be paid from appropriation "Vocational Rehabilitation, U. S. Veterans Bureau, 1922."

Under the travel regulations in effect at that time plaintiff was entitled to expenses of transportation plus a per diem allowance of $5 for actual amounts expended for subsistence not in excess of $5 per day where the amounts so expended were itemized, or $4 per day without an itemization of the subsistence expenses. As a basis for payment by the Veterans Bureau for the allowable per diem expenses and transportation expenses not covered by travel orders, it was necessary under the travel regulations then in effect for the party claiming such amounts to submit a claim therefor on a form provided by the Veterans Bureau.

4. Plaintiff made the trips authorized by the travel orders referred to in the preceding finding but neither upon the completion of these trips nor at any other time prior to his resig-

nation from the Veterans Bureau on August 21, 1923, did plaintiff submit any claim for any of the expenses allowable (including subsistence and amounts expended for transportation) for that travel and nothing has been paid therefor to him or on his behalf. On September 9, 1931, the Veterans Administration, Washington, D. C., received from plaintiff 216 vouchers claiming $1,116.93 for subsistence, per diem, and travel expenses alleged to have been incurred during the years 1922 and 1923. The vouchers were sent to the Chicago office of the Veterans Administration with the information that payment of them was not in order since due to plaintiff's delay in submitting the vouchers it was impossible for any official to certify that the travel had been performed. On July 17, 1941, the claim was again submitted to the Veterans Administration, Washington, D. C. In the meantime the vouchers which had been submitted with the original claim had been destroyed by the Veterans Administration on November 1, 1937, in accordance with regulations of the Veterans Administration permitting the destruction of inactive records. The claim, however, was forwarded by the Veterans Administration to the General Accounting Office on August 18, 1941, with a recommendation for its disapproval. On September 30, 1941, the General Accounting Office denied the claim.

5. The vouchers referred to in the preceding finding were accompanied by a detailed statement on which were set out the items covered thereby. None of the vouchers were prepared at or about the time of the trips in question but were prepared by plaintiff in 1923, 1924, and 1930 from notes then in the possession of plaintiff. The itemized statement of the claim was prepared by plaintiff in January 1931 and at some time thereafter plaintiff destroyed whatever notes he had which formed the basis of the claim. In connection with the submission of that claim plaintiff wrote the following letter to the Veterans Administration on September 2, 1931:

> In reply to your letter of August 24, I can state that my memory of these accounts which should have been submitted in 1922, is not clear on this. My secretary attended to some of these, but my nerves and mental state is such that I overlooked them evidently. Dr.

Lewis J. Pollock, a Chicago neurologist, gave me treatments for a year and a half, so he can explain this better than I can.

6. On July 21, 1923, one month prior to plaintiff's resignation from the Veterans Bureau on August 21, 1923, the attending neuropsychiatric specialist for the Veterans Bureau examined plaintiff on account of a request for leave of absence and at that time gave to plaintiff the following statement:

> This man is carried in the folder as a chronic myocarditic, and also has history of neuropsychiatric experience He has been out-patient, observation and treatment for the past several weeks. He is at present suffering with Frank's psychoneurosis, anxiety, which his employment is aggravating. It is therefore recommended, in the interest of his health, that a ten-days or two-weeks period of relief from his duties as coordinator be given as a therapeutic need.

August 21, 1923, plaintiff resigned from the Veterans Bureau because of ill health. From the time of his resignation until January 1925, he was unemployed. From January 1925 until April 1927, he was employed by the Barber Goodhue Company at $28 per week. Upon leaving that employment, he was unemployed for approximately two months and then took a job with the Walgreen Drug Company which he kept until October 1930. In this latter position he received $40 per week. Since December 1931, he has been receiving compensation from the Veterans Administration of $100 per month.

7. In October and November 1924, May 1925, February 1926, April 1927, July 1928, and July 1930, plaintiff was examined by physicians connected with the Veterans Bureau who were specialists in the field of mental disorders and diseases. The finding of the physician in July 1930 which was similar to the findings of the other physicians on the dates mentioned was as follows:

> Herbert F. Wascher is a psychoneurotic who, in addition to somatic complaints, sleeplessness, lacks self-confidence, is fearful, anxious, suffers from cervical pains, morning fatigue, avergia, lack of power of decision, difficulty in concentration. He is inclined to be

morose and unsocial in his attitude; disability is of the anxiety type, moderate in degree.

My neuropsychiatric diagnosis was psychasthemia, moderate, competent. Hospitalization is not recommended. It was recommended that Mr. Wascher resume his former occupation. In my opinion he was competent at this time.

In each case the examining physicians gave as their opinion that plaintiff was competent at the time of their respective examinations.

8. The evidence does not establish that plaintiff was insane or incompetent during the period of his employment in the Veterans Bureau, or from the time of his resignation therefrom until March 26, 1932.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

In this suit recovery is sought for expenditures for travel, subsistence in lieu of per diem, and for per diem allowances in lieu of subsistence by a former employee of the United States Veterans Administration.

Herbert F. Wascher, for whose benefit this suit is brought and who for convenience will be referred to as "plaintiff," was employed as a training assistant by the United States Veterans Administration (then known as the Veterans Bureau) at Chicago, Illinois, from September 20, 1921, to and including August 21, 1923. During that period his duties required him to travel from the Chicago office to various points within the territory covered by that regional office of that Government Agency, for which some 158 travel orders were duly issued to him. These orders provided that while he was away from his station he would be paid the usual and necessary transportation expenses and expenses actually incurred for subsistence, not to exceed $5 a day. The travel regulations then in effect provided for a per diem allowance of $5 where the expenses incurred for subsistence were itemized, and an allowance of $4 a day without an itemization.

Plaintiff made the trips authorized by the travel orders, but submitted no claim for transportation or subsistence

expenses until September 9, 1931, which was more than six years after the last travel had been performed in 1923. At that time the Veterans Administration advised plaintiff that payment was not in order, since due to plaintiff's delay in submitting the vouchers, it was impossible for any official to certify that the travel had been performed. The claim was again submitted on July 17, 1941, but in the meantime whatever vouchers had been submitted by plaintiff had been destroyed by the Veterans Administration under its regulations permitting the destruction of inactive records, and the Veterans Administration forwarded the claim to the Comptroller General with a recommendation for its disapproval, which recommendation was followed by that office. This suit was instituted April 23, 1943.

The Government defends on the ground that the action was not timely instituted, and is now barred by the statute of limitations under Title 28, U. S. C. A., Section 262, which provides so far as material as follows:

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues. The claims of * * * insane persons * * * shall not be barred if the petition be filed in the court * * * within three years after the disability has ceased; * * *.

The defense as to the six-year period of limitations is, of course, good for the reason that all of the travel on account of which the claim accrued occurred prior to August 21, 1923, when plaintiff resigned from the Veterans' Administration, and the claim was first presented to that agency on September 9, 1931, some eight years after the claim accrued. That period of limitations had also run prior to the appointment in 1932 of a conservator for plaintiff. The only question remaining is whether plaintiff is saved from that provision by reason of insanity during the period when the claim should have been filed.

While no brief was filed on behalf of plaintiff, it is alleged in the petition that "prior to the time that the right to receive reimbursements for the said travel expense which

accrued under the said official travel orders issued to Herbert F. Wascher, the said Herbert F. Wascher became insane and incompetent, and ever since has been, and now is insane and incompetent," and that therefore this suit is timely. The burden of proving insanity is on the person alleging it—in this case on the plaintiff. It is presumed in law that all men are sane, and that presumption continues until a finding is made to the contrary. The appointment of a conservator for the person and property of plaintiff, by a court of competent jurisdiction in the state in which he resided, did not occur until 1932, which was after the six-year period of limitations had run, and we have no evidence of any prior finding or adjudication of insanity or incompetence. In addition, the evidence presented by plaintiff falls far short of the burden imposed on him of showing that he was not sane or competent during the period from 1923 to 1931, when he first presented his claim to the Veterans' Administration. Apparently his physical and mental condition was not substantially different during the period when he was employed by the Veterans' Administration from what it was after he left that agency. Prior to his resignation, he was examined by a neuropsychiatric specialist for that bureau, who testified in this proceeding that while plaintiff was suffering from psychoneurosis, he did not consider him insane or incompetent. After plaintiff left the Administration, he was examined on some six or seven different occasions from 1924 to 1930 by specialists in nervous diseases for the Administration, and these physicians all testified that plaintiff was not insane or incompetent. During the greater part of the period from January 1925 to October 1930, plaintiff was gainfully employed. The allegation of insanity and incompetence is therefore not sustained.

In reaching that conclusion, we are not unmindful of the moral claim which exists by reason of the fact that plaintiff made expenditures in the performance of his official duties for which, but for the statute of limitations, he is entitled to reimbursement. Difficulty in determining that exact amount now should not prevent a present determination of at least a part of the claim with a fair degree of accuracy for the reason that the minimum subsistence allowance of $4 a day

was allowable without itemization. Some alleviating circumstances for failure to make a timely presentation of the claim may well be considered to exist by reason of plaintiff's psychoneurotic condition, which apparently was a service-connected disability, but which, for reasons already stated, have not been shown to be sufficient to render him incompetent or insane.

While plaintiff was negligent in presenting his claim, that negligence must be shared by the Veterans' Administration, which was well aware that these trips were being made over a period of some eighteen months prior to his resignation without the submission of any travel vouchers for transportation and subsistence expenses. However, the bar of the statute of limitations having fallen, we have no alternative under the statute but to dismiss the petition.

Reimbursement of plaintiff rests solely in the discretion of the Congress.

It accordingly follows that the petition must be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM ZAGURSKI v. THE UNITED STATES

[No. 46205. Decided May 7, 1945]

On Defendant's Motion to Dismiss

Suit for salary; laches.—Where plaintiff, an employee of the Government in the Philadelphia Navy Yard, was discharged on March 5, 1941; and where his petition in the instant case was filed in the Court of Claims on August 11, 1944; it is *held* that plaintiff, having for a period of more than three years and a half taken no action to secure the rights of which he claims he has been deprived, has been guilty of laches and is not entitled to recover. *Arant* v. *Lane*, 249 U. S. 367; *Norris* v. *United States*, 55 C. Cls. 208, 257 U. S. 77; and *Nicholas* v. *United States*, 257 U. S. 71, cited.

Mr. William T. Hannan for plaintiff. *Mr. Louis J. Roma, Jr.*, was on the brief.

Mr. Clay R. Apple, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on defendant's motion to dismiss the petition.

Plaintiff, alleging that he was unlawfully discharged from his position as an electric craneman in the Philadelphia Navy Yard, sues for the salary of which he alleges he has been unlawfully deprived.

He alleges that he was discharged on March 5, 1941, because, as stated in the letter to him enclosing his discharge card, which is attached as an exhibit to his petition, "you definitely knew that you were born in a foreign country and intentionally and wilfully falsified concerning your name and place of birth and citizenship when you filed your application, and, in addition, that you gave the same false information when you joined the U. S. Army in 1919." He alleges that he remained unemployed until June 5, 1941, when he was employed by the Pennsylvania Forge Company, and that he worked with this company, at wages less than he had been receiving with defendant, until May 4, 1943, when he was reemployed by defendant at the Philadelphia Navy Yard in his former capacity as an electric craneman. He sues for the loss of wages in the interim.

The defendant defends on several grounds, among which is that plaintiff had been guilty of laches in asserting his claim.

The petition shows that after receipt of the letter of March 5, 1941, enclosing his discharge card, plaintiff complained thereof to the Secretary of the Navy, who referred him to the Civil Service Commission. He does not allege that he got in contact with that commission, but it is inferable that he did not, since he alleges that commission had no jurisdiction of the matter. The next action which he alleges he took was on May 29, 1944, more than three years later, when he again wrote the Secretary of the Navy requesting a hearing, and

was again referred to the Civil Service Commission. His suit was filed on August 11, 1944.

Thus, for a period of over three years and a half, plaintiff took no action to secure the rights of which he claims he has been deprived. It, therefore, must be held, under the authority of *Arant* v. *Lane*, 249 U. S. 367; *Norris* v. *United States*, 55 C. Cls. 208; 257 U. S. 77; and *Nicholas* v. *United States*, 257 U. S. 71, that plaintiff has been guilty of laches and is not entitled to recover.

In the *Arant* case plaintiff had protested against his removal and refused to relinquish his position or to give up the property in his charge until he was forcibly ejected and his papers seized. He waited for about 20 months to take action in court to secure his rights. The Supreme Court said:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.
>
> Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

In *Norris* v. *United States*, 257 U. S. 77, plaintiff delayed for a period of 11 months to bring suit for the salary of which he had been deprived. This delay, the court held, prevented him from recovering.

In *Nicholas* v. *United States*, 257 U. S. 71, plaintiff delayed three years to bring suit for the wages to which he alleged he was entitled, and the court held that he was barred by

laches, on the principle set out in the quotation from the *Arant* case.

It is unnecessary to discuss the other defenses raised in defendant's motion to dismiss, since we are of opinion that plaintiff is clearly barred from recovery by his long delay in suing on his claim. Defendant's motion is sustained and plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ARTHUR C. NORCUTT v. THE UNITED STATES

[No. 46293. Decided May 7, 1945]

On Defendant's Demurrer

Tort; Court of Claims without jurisdiction.—Where the petition alleges a case of tort; and where it is admitted by the plaintiff in his brief submitted to the court that the conduct which he alleges is a tort and an intentionally malicious act for which criminal prosecution should be brought; it is *held* that the Court of Claims is without jurisdiction under section 145 of the Judicial Code (U. S. Code, Title 28, section 250).

Arthur C. Norcutt, per se.

Mr. Horace G. Marshall, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the Court:

The plaintiff brings this suit as the father of Roger T. Norcutt, deceased, and as his legal representative, although there is no allegation that papers have been taken out as administrator of the estate of the deceased.

It appears that while Robert T. Norcutt was an enrollee of the Civilian Conservation Corps, he became a patient at the Station Hospital, Fort Robinson, Nebraska. It is alleged that he met his death on July 17, 1937, as the result of

improper medical care and treatment at the hands of Richard L. Ivins, M. D., a contract physician in the employ of the Army and stationed at Fort Robinson, Nebraska. There is an admission in the petition that the deceased was afflicted with mastoiditis, prior to his enlistment in the Civilian Conservation Corps, and that when he entered the hospital his illness had been diagnosed as "Mastoiditis, chronic, suppurative, moderately severe, right, cause undetermined."

The petition alleges further that, although the deceased was so suffering at the time of his death, the immediate causes of his death were improper medical attention, and an unskilled, illegal and experimental operation performed upon the brain of the deceased by Dr. R. L. Ivins, a contract physician. There are further allegations of improper and negligent care of the body in preparation for burial and shipment, and also of mutilation of the body, failure to embalm it at Crawford, and the necessity of the family having the body properly embalmed after shipment to Ogallala, Nebraska.

As a result of the alleged wrongful, improper, tortious acts, plaintiff seeks damages for "mortification, mental shock, and chagrin," together with the loss of the earnings of the son, extra funeral expenses, expenses of preparing suit, subsequent expenses, and the right of support of plaintiff during his old age.

Plaintiff filed a claim for compensation with the United States Employees' Compensation Commission in April 1938, which was denied because the evidence failed to show that the death was occasioned by traumatic injury resulting from an accident.

A bill was introduced and passed by the Congress for payment of the claim, but this bill never became a law because of the veto by the President on December 18, 1943, on the ground that the law did not permit payment in the case of injury in the Civilian Conservation Corps unless the disability resulted from a traumatic injury.

The petition alleges a case of tort on the part of the doctor performing the operation. It is admitted by the plaintiff in his brief submitted to the court that the conduct which he

alleges is a tort and an intentionally malicious act for which criminal action should be brought.

No matter how vicious or malicious a tort, this court is without jurisdiction in cases sounding in tort. Judical Code Sec. 145 (Title 28 U. S. Sec. 250); *Persful* v. *United States*, 102 C. Cls. 232.

Plaintiff's petition, not stating a cause of action within the jurisdiction of the court, must be dismissed.

There is a second reason which bars recovery. Plaintiff alleges that his son died on July 17, 1937, and the cause of action, if any, accrued then. The petition was not filed until January 23, 1945, which is more than six years thereafter. The statute of limitations permits a suit to be brought within six years after the cause of action has accrued. Judicial Code, Sec. 156 (Title 28 U. S. C. Sec. 262).

The petition having been filed more than six years from the time the cause of action accrued, the Court has no jurisdiction under the statute.

Defendant's demurrer is sustained and plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

ROANOKE IRON WORKS, INC., A CORPORATION, v. THE UNITED STATES

[No. 44178. Decided May 7, 1945]

On the Proofs

Increased costs due to the enactment of the National Industrial Recovery Act; claims not timely filed.—Where the plaintiff sues for increased labor and material costs, due to the enactment of the National Industrial Recovery Act, in the performance of five subcontracts entered into with prime contractors of the Government; it is *held* that except as to one of the five subcontracts the proof shows that plaintiff's claim is barred by section 1 of the Act of June 25, 1938.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for plaintiff.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff brought this suit to recover $2,380.18 increased labor and material costs alleged to have been incurred, as a result of the enactment of the National Industrial Recovery Act, in the performance of five subcontracts entered into with prime contractors of the Government.

Defendant contends (1) that the claims under all the subcontracts, except the one relating to the post office building at Littleton, New Hampshire, are barred because not timely filed with the Department concerned under sec. 4 of the act of June 16, 1934, (2) that the proven excess labor costs as to all contracts did not exceed $984.58, and (3) that the proof does not establish that any of the claimed excess material costs resulted from the enactment of the National Industrial Recovery Act (49 Stat. 195).

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. During December 1932, and February and March 1933, defendant entered into five prime contracts for the construction of post office buildings at Stroudsburg, Pa., Crisfield, Md., Presque Isle, Maine, Littleton, N. H., and Bloomfield, N. J. In January, March, April, and May, 1933, plaintiff, a Virginia corporation with principal office at Roanoke, entered into separate subcontracts with each of the five prime contractors to furnish miscellaneous and ornamental metal work in the construction of the buildings.

2. October 1, 1933, plaintiff signed the President's Reemployment Agreement with the substituted provisions of the tentative Code of Fair Competition for the Fabricated Metal Products Industry, and, thereafter, became bound by the provisions of said Code of Fair Competition. Plaintiff raised its wage scale to comply with the provisions of this Agreement and Code as applicable to its industry, and,

in so doing, incurred increased costs of performance in the sum of $984.58, as follows:

Contract 7311—Stroudsburg, Pa	$83.02
Contract 7322—Presque Isle, Maine	75.49
Contract 7324—Crisfield, Md	34.76
Contract 7325—Littleton, N. H	467.42
Contract 7326—Bloomfield, N. J	323.89
Total	984.58

The above increased labor costs resulted from the enactment of the National Industrial Recovery Act.

3. In the performance of the five subcontracts subsequent to June 16, 1933, plaintiff paid for materials used thereon the following amounts in excess of the amounts that the materials would have cost at and prior to June 16, 1933, the date of enactment of the National Industrial Recovery Act, as follows:

Republic Steel Corp	$166.17
Atlantic Steel Co	118.03
White Foundry Co	297.85
Miscellaneous iron and hardware	314.74
Total	896.79

4. The following increased costs for materials subsequent to June 16, 1933, were paid in respect of materials furnished for each post office building, as follows:

Stroudsburg, Pa	$123.21
Presque Isle, Maine	159.71
Crisfield, Md	127.90
Littleton, N. H	233.92
Bloomfield, N. J	252.05
Total	896.79

5. There is no proof that plaintiff's overhead expenses were increased as a result of the enactment of the National Industrial Recovery Act.

6. The following increased material costs are shown to have been incurred and paid by plaintiff as a result of the enactment of the National Industrial Recovery Act:

Stroudsburg, Pa	$49.62
Presque Isle, Maine	48.50
Crisfield, Md	20.97
Littleton, N. H	115.00
Bloomfield, N. J	63.76
Total	297.85

7. Plaintiff filed separate claims under the act of June 16, 1934, for increased labor and material costs in respect of each subcontract within six months of the date of final settlement of the respective prime contracts, but more than six months after completion of all the prime contracts except the prime contract for the building at Littleton, N. H., as follows:

Building	Date of completion	Date of final settlement	Date filed
Stroudsburg, Pa	June 21, 1934	Sept. 27, 1934	Mar. 25, 1935
Presque Isle, Maine	June 1, 1934	Feb. 19, 1935	June 7, 1935
Crisfield, Md	May 10, 1934	Sept. 15, 1934	Mar. 12, 1935
Littleton, N. H	Jan. 15, 1935	June 21, 1935	June 7, 1935
Bloomfield, N. J	Nov. 10, 1934	Mar. 27, 1936	June 7, 1935

The proof does not show that the Comptroller General extended the time for filing any of the above-mentioned claims or that he took such action as would amount to an extension of time for filing.

The court decided that the plaintiff was entitled to recover as to the Littleton, N. H. claim only, in an opinion *per curiam*, as follows:

Per Curiam: The facts show (finding 7) that except as to the claim for increased costs incurred in connection with the building at Littleton, N. H., plaintiff's claim is barred by sec. 1 of the act of June 25, 1938 (52 Stat. 1197).

The proof satisfactorily establishes that as to the Littleton, N. H., contract plaintiff incurred and paid increased labor costs of $467.42 and increased material costs of $115 as a result of the enactment of the National Industrial Recovery Act. Judgment is therefore entered in plaintiff's favor for $582.42. It is so ordered.

MARIETTA CHAIR COMPANY v. THE UNITED STATES

[No. 44192. Decided May 7, 1945]

On the Proofs

Increased costs due to enactment of National Industrial Recovery Act; proof.—Where the proof is insufficient to show the amount of increased labor costs caused by the enactment of the National Industrial Recovery Act; and where, however, it is established that the minimum increase paid to workmen of plaintiff was two cents per hour, except two who were unaccounted for, it is *held* that plaintiff is entitled to recover the amount of such increase.

The Reporter's statement of the case:

Mr. William E. Carey, Jr., for plaintiff. *Mr. Fred B. Rhodes* was on the brief.

Mr. Clay R. Apple, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The Marietta Chair Company is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Ohio.

2. In June 1933, on a date not shown, plaintiff entered into contract numbered 3213 with defendant for the furnishing of certain chairs to the Veterans' Administration. July 1, 1933, plaintiff entered into another contract, numbered Tgs-9287, with defendant for the furnishing to the Treasury Department of certain chairs, mirrors, telephone stands and stools. Performance was completed by plaintiff in August 1934, and the contract prices have been paid to plaintiff. Claims for the increased costs here in issue were presented to the Veterans' Administration and to the Treasury Department, respectively, in December 1934.

3. Plaintiff signed the President's Reemployment Agreement September 5, 1933, by which agreement plaintiff promised, *inter alia:*

> [3] Not to employ any factory or mechanical worker or artisan more than a maximum week of 35 hours until

December 31, 1933, but with the right to work a maximum week of 40 hours for any six weeks within this period; and not to employ any worker more than 8 hours in any one day.

* * * * *

[6] Not to pay any employee of the classes mentioned in paragraph (3) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour. It is agreed that this paragraph establishes a guaranteed minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on a piece work performance.

Changes in the foregoing provisions fixed the maximum week at 40 hours, except during seasonal peaks, and fixed the minimum wage at 34 cents per hour for the area involved in this case, except with reference to apprentices. The date of the changes does not appear.

The Code of Fair Competition for the Furniture Manufacturing Industry, approved December 7, 1933, and made a part hereof by reference, provided, *inter alia:*

1. Except as provided in subsection (b) of this Section:

(a) No employee in the States of Virginia, North Carolina, South Carolina, Tennessee, Kentucky, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas, and that part of the State of Missouri south and west of an air line beginning at Thayer in Oregon County to Buffalo in Dallas County, thence directly west to the Kansas State line; and no employee in any factory, the output of which consists of more than 90% of chairs with double woven cane seats, shall be paid at less than the rate of 30 cents per hour.

(b) No other employee shall be paid at less than the rate of 34 cents per hour.

Labor Costs

4. Immediately prior to the signing of the President's Reemployment Agreement, plaintiff employed sixty-four workmen in the factory where the furniture was made, forty-eight of whom received from 20 cents to 25 cents per hour and

twelve of whom received from 28 cents to 60 cents per hour. The wage rates for the remaining four do not appear. As a result of and promptly following the signing of the President's Reemployment Agreement thirty-eight of the workmen received increases of between 2 cents and 4½ cents per hour, twenty-one received increases of between 5 cents and 7½ cents per hour, and one received an increase of 11½ cents per hour. The average increase was 4.6 cents per hour.

5. Plaintiff's time records for individual workmen were kept on the basis of "pay hours" as distinguished from actual hours. The term "pay hours" is adopted for these findings to indicate the number of hours upon which a workman's pay was based, but which sometimes exceeded the actual hours of labor performed by the workman. The difference arose from a system under which the employer first determined, through appropriate means, the exact time within which a given piece should be made by a workman. Upon the basis of such a determination, a workman was expected to do a given number of pieces per 9-hour day. His pay was not reduced if he failed to do the expected number of pieces, but, in the event he exceeded that number, he was credited with having worked more hours than he actually worked, the amount of credit depending upon the judgment of the superintendent as to the amount of excess production, and he received greater compensation accordingly. In this way a workman might actually work only nine hours but might receive credit and would be paid for ten or twelve hours.

6. The number of *actual* hours of labor in performance of the contracts at the increased wage rates does not appear. The number of *actual* hours of labor, either by individuals or in the aggregate, is not susceptible of proof from the records of plaintiff, but the number of "pay hours" of labor performed by each workman and the wage rate of each workman are susceptible of proof from such records. The record discloses the number of "pay hours" of labor performed by the workmen individually for the first seven weeks after the increases, but not for the remaining approximate nine months of performance.

For the entire period after the time the pay was increased, an aggregate of 7,584 "pay hours" of labor was performed

by all workmen on contract numbered 3213, and an aggregate of 2,520 "pay hours" of labor was performed by all workmen on contract Tgs-9287. The average wage increase (4.6 cents—Finding 4) applied to the aggregate number of "pay hours" of work done after the wage increases results as follows:

Contract No. 3213, 7,584 hours	$348.86
Contract Tgs-9287, 2,520 hours	115.92
Total	464.78

7. There is no satisfactory proof as to the amount of wage increases in the performance of these two contracts resulting from the passage of the National Industrial Recovery Act. It is shown, however, that the minimum wage increase was two cents per hour.

Cost of Materials

8. *Lumber.*—The furniture was manufactured from lumber purchased by plaintiff prior to the signing of the President's Reemployment Agreement in September 1933. Plaintiff offered evidence on the theory that it would be entitled to recover if it were obliged to restock the depleted inventory at increased prices resulting from the enactment of the National Industrial Recovery Act. Under contract numbered 3213 plaintiff used 11,054 board feet of oak which cost $50 per thousand, 5,366 board feet of oak which cost $56 per thousand, 8,150 board feet of ash which cost $43 per thousand, and 6,500 board feet of ash which cost $38 per thousand. The kind and grades of oak and ash are not shown. With reference to lumber used under contract Tgs-9287, neither the kind, quantity, nor grade is shown.

The price of oak lumber purchased by plaintiff during the term of the contracts after the signing of the President's Reemployment Agreement did not exceed the market price of such lumber prior thereto, except in instances where the replacement lumber was purchased from a subordinate department or subsidiary of plaintiff. There is no proof of the quantity, grade, or price of ash lumber, if any, purchased by plaintiff after the signing of the President's Reemployment Agreement.

It is not shown by satisfactory competent evidence that plaintiff incurred any increase in cost over the market prices of lumber at the time of making the contracts which resulted from the enactment of the National Industrial Recovery Act.

9. *Rods, finishing, and mirrors.*—After the enactment of the National Industrial Recovery Act, plaintiff purchased and used for constructing furniture under the contracts the following materials at the following costs over the market prices for the same materials prior to the enactment of the National Industrial Recovery Act:

Iron rods	$7.20
Finishing materials	56.36
Mirrors (plate)	41.04

It is not shown by satisfactory competent evidence that the increase in cost to plaintiff resulted from the enactment of the National Industrial Recovery Act.

Overhead

10. Plaintiff bases its claim for increased overhead on the ground that a decrease in the time of the workweek necessarily increased the overhead. There is no evidence of actual increase in the cost of overhead, but plaintiff estimates that the cost of overhead is 125 percent of its direct labor cost and that the overhead was increased in an inverse proportion to the decrease in the hours of labor.

The evidence does not establish that (a) the hours of labor were substantially decreased after the signing of the President's Reemployment Agreement, or (b) that the decrease in hours of labor resulted in an increase in the cost of overhead.

The court decided that the plaintiff was entitled to recover in an opinion *per curiam*, as follows:

Per Curiam: Plaintiff sues to recover increased costs alleged to have been caused by the enactment of the National Industrial Recovery Act (48 Stat. 195). Its proof is wholly insufficient to show the amount of the increase so far as labor costs are concerned. It shows the number of "pay hours" of labor performed in carrying out the contracts, but does

not show the increased wages paid therefor. There is no showing as to what laborers worked on these contracts, nor the amount of the increase in their wages.

The commissioner of the court has computed an average wage increase, but whether or not this average wage should be applied to these contracts we cannot tell from the proof. However, the minimum increase paid plaintiff's workmen, except four who are unaccounted for, was two cents per hour. Plaintiff's costs must have been increased by this amount, multiplied by the number of "pay hours" spent on the contracts, to wit, 10,104. It results that under the proof plaintiff is entitled to recover the sum of $202.08 for increased labor costs.

The proof fails to show that there was any increase, due to the enactment of the Act, in the cost of the lumber or other materials used in the manufacture of the articles furnished.

Judgment will be entered in favor of plaintiff for $202.08. It is so ordered.

FOLGER ADAM v. UNITED STATES

[No. 44230. Decided May 7, 1945]

On the Proofs

Increased costs under National Industrial Recovery Act; waiver of time limitation by Comptroller General; jurisdiction.—Where plaintiff, on April 30, 1936, filed his claim with the Treasury Department for increased costs under the Act of June 16, 1934; and where the claim was duly presented to the Comptroller General, who considered and acted upon it on its merits without any objections as to the date of filing; it is *held* that the Court of Claims has jurisdiction of the claim under the Act of June 25, 1938. *The Kawneer Company, et al.* v. *United States*, 100 C. Cls. 523.

Same; purpose of Act of June 25, 1938.—The history and purpose of the Act of June 25, 1938, show that the reason or cause for increased costs, rather than the full or substantial compliance with a Code, is the basis for recovery under the Act, which provides for entry of judgment for "increased costs incurred as a result of the enactment of the National Industrial Recovery Act". *McCloskey & Co.* v. *United States*, 98 C. Cls. 90, cited. *Consumers Paper Co.* v. *United States*, 94 C. Cls. 713, distinguished.

Same; proof.—Where the proof satisfactorily shows the increased wages paid in the amount of $938.01 resulted from the enactment of the National Industry Recovery Act and the Code of Fair Competition promulgated thereunder, it is *held* that plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for plaintiff.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover $2,563.74 as increased costs for labor, material, and overhead expense in the respective amounts of $938.01, $307.77, and $1,317.96, alleged to have been incurred as a result of the enactment of the National Industrial Recovery Act (48 Stat. 195).

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. January 30, 1933, defendant entered into a contract with the Great Lakes Construction Company for the construction of certain buildings at the United States Narcotic Farm at Lexington, Kentucky, the specifications including certain locking equipment for isolation cells.

2. April 18, 1933, plaintiff, a resident and citizen of Joliet, Ill., and engaged in manufacturing and installing locking equipment for penal institutions, entered into a subcontract with the prime contractor by which plaintiff agreed to furnish and install the locking equipment. In order to secure this contract plaintiff was required by the Great Lakes Company to promise and he did verbally promise that he would "service" the work by adjusting and keeping the locking equipment in order for a year after the inmates were moved into the buildings. The contract between the defendant and the Great Lakes Company contained no requirement for servicing or adjusting the locking equipment after installation and acceptance of completion of the work called for by the prime contract.

3. November 2, 1933, the President approved the "Code of Fair Competition for the Fabricated Metal Products Manu-

facturing, and Metal Finishing and Metal Coating Industry," arts. 3 and 5 of which provided in part as follows:

3. On and after the effective date of minimum wage which shall be paid by any employer to any employee engaged in the processing of products in the Industry and any labor incident thereto, shall be 40¢ per hour for male * * *.

* * * for a period of not to exceed 60 days, beginners, without experience, may be paid not less than 80% of the minimum wages of 40¢ * * *.

Equitable adjustments to maintain differentials existing as of May 1, 1933, in all pay schedules of factory employees (and other employees receiving less than $35.00 per week) above the minimums, shall be made on or before fifteen days subsequent to the effective date of this Code by any employers who have not heretofore made such adjustments or who have not maintained rates comparable with such equitable adjustments; * * *.

5. * * *

Hours.—1. On and after the effective date employers shall not operate on a schedule of hours of labor in excess of 40 hours per week per employee.

Provided, however, that these limitations shall not apply to branches of this Industry in which seasonal or peak demands or breakdowns place an unusual and temporary burden upon such branches; and that in no case shall the hours worked in any one week exceed 48 hours during such seasonal or peak periods; and

Provided further, that the number of excess hours worked in any six (6) months' period, without the payment of overtime, may not exceed 32 hours, in the case of employees engaged in the processing of products in the Industry and labor incident thereto; and may not exceed 48 hours, in the case of all other employees except executive, administrative and supervisory employees who receive $35.00 or more per week and outside salesmen, commission salesmen, and service men; and

Provided further, that any employee at the request of the employer may work additional hours beyond those specified in the two preceding paragraphs, provided such additional hours shall be paid for at the rate of time and one-half.

July 5, 1934, the President approved a "Supplementary Code of Fair Competition for the Prison Equipment Manu-

facturing Industry," Article 3 of which provided in part as follows:

> This Industry is a division of the Fabricated Metal Products Manufacturing and Metal Finishing and Metal Coating Industry and without limitation the wage, hour and labor provisions in Article 3 of its Basic Code as approved by the President, November 2, 1933 * * * are specifically incorporated herein and made a part hereof as the wage, hour and labor provisions of this Supplementary Code.

Claim for Labor Costs

4. During all times here involved plaintiff regularly employed 13 men in his shop, who, among other jobs, made the equipment involved in this case. From the first week in July, 1933, when plaintiff commenced work on this job, up to February 10, 1934, these men were paid at the following hourly rates: five were paid 22½¢, three were paid 25½¢, two were paid 34¢, one was paid 38¼¢, one was paid 51¢, and one was paid 68¢. Plaintiff did not increase their rate of pay when the Code of Fair Competition for the Fabricated Metal Products Manufacturing and Metal Finishing and Metal Coating Industry became effective on November 12, 1933, because he felt that he would "go broke" if he did so.

Plaintiff subscribed to the Code February 10, 1934, however, and thereupon increased the wages of his employees and thereafter paid these employees at the following increased hourly rates: Two were raised from 22½¢ to 25¢, or an increase of 11.1% (these workmen were apprentices); three were raised from 22½¢ to 40¢, or an increase of 77.8%; three were raised from 25½¢ to 40¢, or an increase of 56.9%; two were raised from 34¢ to 40¢, or an increase of 17.6%; one was raised from 38¼¢ to 40¢, or an increase of 4.6%; one was raised from 51¢ to 65½¢, or an increase of 28.4%; and one was raised from 68¢ to 87½¢, or an increase of 28.7%.

Such increase in the cost of labor, amounting in the aggregate to $938.01, was incurred as a result of the enactment of the National Industrial Recovery Act.

Hours of Labor

5. Prior to November 12, 1933, the date the Code became effective, the workweek on the job here involved was, with slight variations, 45 hours. After the Code became effective and until February 10, 1934, when plaintiff subscribed to the Code, eight of plaintiff's regular employees worked for varying periods on the job here involved, aggregating 47 man-weeks of labor. Of this total, 30 man-weeks exceeded forty hours each.

After plaintiff subscribed to the Code and until the end of the job, thirteen of plaintiff's regular employees worked for varying periods on the job here involved, aggregating 771 man-weeks of labor. Of this total, 222 man-weeks exceeded 40 hours each. There is no evidence that any breakdown placed an unusual or temporary burden during the weeks which exceeded 40 hours and the evidence shows that there was not a seasonal or peak demand during such weeks. No overtime was paid for work in excess of 40 hours per week.

Claim for Materials

6. Plaintff's cost of materials in performing his contract was $307.77 higher than the market prices at the time of making the contract. It is not shown by satisfactory competent evidence that the increase in actual cost over the market prices at the time of making the contract resulted from the enactment of the N. I. R. A.

Claim for Overhead

7. Plaintiff bases his claim for overhead primarily on the contention that his shop maintained a workweek of 55 hours before February 10, 1934; that this was reduced to 40 hours after that time by the N. R. A.; that this reduction in hours per week equaled 27%, and that it therefore lengthened the total time for the job by 27%, with a corresponding increase in cost of overhead. The evidence does not establish that the overhead was so increased.

During the six months prior to the time plaintiff subscribed to the Code plaintiff did not maintain a 55-hour

workweek on the job here involved but maintained substantially a 45-hour workweek.

Following the time plaintiff subscribed to the Code (February 10, 1934) 222 man-weeks out of a total of 771 were not reduced to the Code maximum of 40 hours. For reasons not shown, plaintiff reduced 225 man-weeks to hours substantially below the Code maximum. As to these, failure to maintain the longer workweek is not attributable to the 40-hour Code maximum.

From the standpoint of calendar weeks, plaintiff did not consistently maintain the workweek at 40 hours after February 10, 1934. During the 98 weeks following that date there were only 18 weeks of substantially 40 hours' work.

8. Plaintiff bases his claim of increased overhead in part on the contention that the cost of several items, including coal, factory supplies, tools and repair parts, rose as a result of the N. I. R. A. There is no evidence of increased cost of specific items, but only the total computed by plaintiff and his opinion that the cost of such items increased as a part of a general trend stimulated by and following the enactment of the N. I. R. A. The evidence does not satisfactorily establish the amount of such increased costs or that they were a result of the enactment of the N. I. R. A.

9. All work under the prime contract between defendant and Great Lakes Construction Company was actually completed September 16, 1935. Defendant's construction engineer on October 14, 1935, recommended to the Treasury Department that the work be accepted and certified as complete as of September 16, 1935. The Treasury Department on December 23, 1935, notified the Great Lakes Construction Company that it had authorized final settlement, and on the same day wrote the construction superintendent to issue a certificate of completion and acceptance. On the same day the final voucher was prepared, was executed by the contractor, and was certified to be correct, and it was approved for payment by defendant's representatives with the notation "Per final report of Constr. Engr. Berryman, 10/14/35." The matter, however, was held up and final payment to Great Lakes Construction Company was not made until April 2, 1936.

10. Installation of the locking equipment by plaintiff under his subcontract with Great Lakes Company was completed in May 1935. The evidence leaves in doubt the exact time when plaintiff completed adjusting or servicing the locking equipment under the verbal agreement between plaintiff and Great Lakes Company, and does not satisfactorily establish that such adjusting or servicing was completed later than the first of January 1936.

April 30, 1936, plaintiff filed his claim for increased costs with the Treasury Department under the act of June 16, 1934 (48 Stat. 974), which claim was transmitted by that Department to the Comptroller General with the required report. The Comptroller General considered and acted upon the claim on its merits without any objection as to the date of filing, and disallowed it May 26, 1937.

The court decided that the plaintiff was entitled to recover.

Opinion Per Curiam: The court has jurisdiction of the claim. *The Kawneer Company, et al.*, v. *United States*, 100 C. Cls. 523.

The proof shows that plaintiff incurred increased labor costs of $938.01 as a result of the enactment of the National Industrial Recovery Act, but the evidence fails to show what amount of increased costs, if any, were incurred for material and overhead as a result of the enactment of that act.

Defendant says that plaintiff's compliance with the National Industrial Act Code (finding 5) was so incomplete that it would not be fair and equitable to allow it reimbursement under the act of June 25, 1938 for the increased wages of $938.01 paid from February 1934, when plaintiff subscribed to the Code and increased its hourly wage rates.

The history and purpose of the act of June 25, 1938 show that the reason or cause for the increased cost, rather than full or substantial compliance with a Code, is the basis for reimbursement set forth in that act, which provides for entry of judgment "for increased costs incurred as a result of the enactment of the National Industrial Recovery Act." *McCloskey & Company* v. *United States*, 98 C. Cls. 90, 106–134. In *Consumers Paper Co.* v. *United States*, 94 C. Cls. 713, 720,

relied on by defendant, the increased wages claimed were not allowed for the period August 25, 1933 to April 6, 1934, because plaintiff had not satisfactorily proven that such increase resulted from the enactment of the National Industrial Recovery Act. Here, however, the proof satisfactorily shows that the increased wages paid in the amount of $938.01 resulted from the enactment of the act of June 16, 1933, and the Code promulgated thereunder. Judgment is therefore entered in favor of plaintiff for this amount. It is so ordered.

KENTUCKY METAL PRODUCTS COMPANY, A CORPORATION v. UNITED STATES

[No. 44410. Decided May 7, 1945]

On the Proofs

Increased costs under National Industrial Recovery Act; jurisdiction under the Act of June 25, 1938.—Where on its two subcontracts and eight sub-subcontracts in the instant suit plaintiff incurred, subsequent to August 10, 1933, increased labor costs of $1,106.04 as the result of the enactment of the National Industrial Recovery Act but where plaintiff filed claims under the Act of June 16, 1934, for increased costs only with respect to its two subcontracts, amounting to $13.35 and 30 cents, respectively, it is *held* that the Court of Claims, under the Act of June 25, 1938, is without jurisdiction to consider plaintiff's claims for increased costs on its eight sub-subcontracts, and plaintiff is entitled to recover only $13.65, on its two subcontracts.

Same.—The Act of June 25, 1938, confers upon the Court of Claims jurisdiction to hear, determine and enter judgment upon the claims of contractors, including completing sureties and all subcontractors and materialmen, for increased costs incurred as the result of the National Industrial Recovery Act, provided that such claims (except as to increased costs during the period June 16 to August 10, 1933), were presented within the limitation period prescribed by section 4 of the Act of June 16, 1934, and the court can make no exception in favor of plaintiff.

The Reporter's statement of the case:

Mr. Wm. E. Carey for plaintiff.

Mr. Fred B. Rhodes was on the brief.

Mr. Armistead B. Rood, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff in its petition filed under the act of June 25, 1938, claimed $9,070.59 as increased costs of labor and material alleged to have resulted from the enactment of the National Industrial Recovery Act of June 16, 1933. In its evidence and brief, it claims increased costs of $1,106.04 for labor and $1,286.84 for materials totaling $2,392.88.

Defendant contends that recovery of the claimed increased labor costs, except $13.65, and the claimed excess material costs, except $15.33, are barred because no claims were filed in respect thereof under the act of June 16, 1934. Defendant further insists that the proof does not show what amount, if any, of increased material cost was attributable to the National Industrial Recovery Act (48 Stat. 195).

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Prior to June 16, 1933, the date of enactment of the National Industrial Recovery Act, defendant entered into ten prime contracts with various contractors for the construction of post office buildings at Jonesboro, Ark., Billings, Mont., Alexandria, La., Cincinnati, Ohio, Jackson and Lansing, Mich., Morris, Ill., Philadelphia and Pittsburgh, Pa., and Westminster, Md.

Plaintiff on May 31, 1933, entered into separate subcontracts with the prime contractor, W. D. Lovell, in connection with the buildings at Billings, Mont., and Jonesboro, Ark. Plaintiff also, prior to June 16, 1933, entered into certain subcontracts with certain subcontractors of the prime contractors in connection with the other eight buildings above mentioned. Under its two subcontracts and eight sub-subcontracts plaintiff furnished certain materials for use in the buildings.

2. Plaintiff signed the President's Reemployment Agreement on July 28, 1933, and became subject to the Code of Fair Competition for the Fabricated Metal Products Manufacturing and Metal Finishing and Metal Coating Industry on November 12, 1933. As required by this agreement and code, plaintiff, pursuant thereto, made adjustments in the hours of work and wages of its employees which resulted in

increased costs in the performance of the subcontracts and sub-subcontracts heretofore mentioned, as follows:

Locations of Post Offices:	*Increased Cost*
Alexandria, Louisiana	$0.71
Billings, Montana	13.35
Cincinnati, Ohio	1.23
Jackson, Michigan	2.89
Jonesboro, Arkansas	.30
Lansing, Michigan	76.98
Morris, Illinois	.10
Philadelphia, Pennsylvania	747.85
Pittsburgh, Pennsylvania	248.38
Westminster, Maryland	14.25
Total	1,106.04

Such labor was performed subsequent to August 10, 1933, and the increased labor cost of $1,106.04 resulted from the enactment of the National Industrial Recovery Act.

3. The cost to plaintiff of materials used or furnished in performing the work required under the foregoing subcontracts was as follows:

Locations of Post Offices:	*Cost of Materials Used*
Alexandria, Louisiana	$122,52
Billings, Montana	109.83
Cincinnati, Ohio	1,651.35
Jackson, Michigan	436.16
Jonesboro, Arkansas	36.22
Lansing, Michigan	426.17
Morris, Illinois	42.92
Philadelphia, Pennsylvania	4,943.70
Pittsburgh, Pennsylvania	1,595.59
Westmininster, Maryland	53.66
Total	$9,418.12

These materials were all used or furnished subsequent to August 10, 1933; approximately 50 percent of the material was taken from stock on hand, the balance being obtained as needed. It is impossible to determine from the evidence what specific materials were used in doing the required work or the amounts thereof; nor is it possible to determine when plaintiff purchased the materials used, or the prices paid for specific materials.

4. It is impossible to determine from the evidence to what extent, if any, the actual cost to plaintiff of the materials

used in doing the required work represented an increase over the prices in effect at and prior to the enactment of the National Industrial Recovery Act.

5. No competent evidence was offered to show that the cost of materials to plaintiff was increased as a result of the enactment of the National Industrial Recovery Act.

6. November 8, 1934, plaintiff filed claims under the Act of June 16, 1934, with the Treasury Department, the department concerned, for increased labor and material costs on the two subcontracts relating to the construction of the post offices at Jonesboro and Billings. Because the supporting data furnished by plaintiff were, on examination, deemed by the Treasury Department to be insufficient, these claims were never transmitted to nor acted upon by the Comptroller General. No claims for increased costs on the other subcontracts mentioned in finding 2 were ever filed by plaintiff under the Act of June 16, 1934 (48 Stat. 974).

The court decided that the plaintiff was entitled to recover.

Opinion per Curiam: The amount of increased cost for material claimed in this suit is $1,286.84 for the ten subcontracts; the claimed increased costs on the Billings, Mont., and Jonesboro, Ark., subcontracts are $12.46 and $2.87, respectively. No increased costs prior to August 10, 1933, are claimed.

On the evidence submitted plaintiff has not shown what amount of increased cost, if any, was incurred for material as a result of enactment of the National Industrial Recovery Act.

On the two subcontracts and the eight sub-subcontracts mentioned in the findings plaintiff incurred increased labor costs of $1,106.04 subsequent to August 10, 1933 as a result of the enactment of the National Industrial Recovery Act, but plaintiff filed claims for increased costs under the act of June 16, 1934, only with respect to its two subcontracts in connection with the buildings at Billings and Jonesboro, and the increased labor costs incurred under these subcontracts amounted to $13.35 and $0.30, respectively. Plaintiff says, however, that as to eight of the buildings in respect of which it did not file claims it was a sub-subcontractor

or materialman and, as such, could not recover increased costs under the terms of the act of June 16, 1934. It is true that the Comptroller General had held on April 4, 1935, and July 21, 1936, as shown in *John B. Kelly, Inc.* v. *United States*, (May 2, 1938), 87 C. Cls. 271, 272, that sub-subcontractors or materialmen furnishing labor or material to a subcontractor were not entitled to claim and be allowed increased costs under the act of June 16, 1934 (48 Stat. 974), but sec. 1 of the act of June 25, 1938 (52 Stat. 1197), authorizing suit in this court, makes no exception in favor of anyone (except as to the period June 16 to August 10, 1933) who had failed to file a claim within the time prescribed by sec. 4 of the act of June 16, 1934. See Report of Committee on the Judiciary, House Report #2609, 75th Cong., 3rd sess. The court can make no exception in plaintiff's favor. Its only remedy for the admitted increased labor costs resulting from the enactment of the National Industrial Recovery Act of $1,092.39, in excess of the amount of $13.65 allowed herein, rests with Congress.

Judgment will be entered in favor of plaintiff for $13.65. It is so ordered.

JOHN CHASE v. THE UNITED STATES

[No. 46113. Decided May 7, 1945]

On Defendant's Demurrer

Internal Revenue offer of reward for information leading to conviction for violation of revenue laws.—Following the decisions in *Katzberg, et al.*, v. *United States*, 93 C. Cls. 281, and *Gordon* v. *United State*, 92 C. Cls. 499, it is *held* that under the provisions of the offer of reward (T. D. 4663) made by the Commissioner of Internal Revenue, under Section 3463, Revised Statutes, the amount of the reward is within the discretion of the Commissioner, and where no definite or ascertainable sum was offered no contract arose from the offer of the reward and the giving of information, if any, by the plaintiff.

Same; oral offer without express authority.—An oral offer by Revenue Agents to pay a reward for information leading to tax recovery, under Section 3463, Revised Statutes, is not, in the absence of express authority, binding upon the Commissioner of Internal Revenue. *Montgomery Ward & Co. et al*, v. *United States*, 94 C. Cls. 309, cited.

Mr. M. Anderson Thomas for plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

The facts sufficiently appear from the opinion of the court.

Per Curiam: Plaintiff sues to recover $75,000 as a reward alleged to be due him under Treasury decision 4663 issued pursuant to authority of sec. 3463 Revised Statutes (U. S. C. A., Title 26, sec. 3792).

Plaintiff alleges in his petition that on November 28, 1935, he was promised orally by George Boyd, an internal revenue agent, and by Donald Rogers, a special agent of the Bureau of Internal Revenue at San Francisco, that if he would give information which would lead to the detection of anyone for violation of the Internal Revenue Laws by evading income taxes and to the recovery of income taxes, and penalties thereon, he would be rewarded therefor by the Commissioner of Internal Revenue, in accordance with Treasury decisions 4663, in the amount of ten percent of the amount recovered; that, relying on such promise and offer of reward by said agents and by the Commissioner of Internal Revenue under such Treasury decision, plaintiff gave said agents some information and thereafter, for the greater part of a year immediately following said date, continuously devoted his time to securing and giving additional information, and gave information which, according to his best information and belief, led to the detection of Charles H. Strub of San Francisco for violation of the Internal Revenue laws by evading income taxes in the First and Second Collection Districts of the state, and to the recovery of income taxes and penalties thereon assessed and collected by the Bureau of Internal Revenue, which information was furnished by him to Internal Revenue Agent Boyd and Special Agent Rogers of the Bureau of Internal Revenue.

The petition further alleges that plaintiff does not know the exact amount of income taxes and penalties thereon assessed and collected from said Charles H. Strub, or when the taxes and penalties were paid, but is informed and believes that the sum was $750,000, or thereabouts, and that it was paid to the Bureau of Internal Revenue and into the

Treasury of the United States during the period between January 1, 1939, and January 29, 1941; that application was made for an examination of papers in the Bureau of Internal Revenue to the Commissioner of Internal Revenue, but the Commissioner refused plaintiff's request to inspect said papers, being records in the office of Internal Revenue showing the amount of income taxes and penalties collected from Charles H. Strub for 1935 and 1936, and a letter signed by a Mr. Brady in the month of December, 1936, instructing Internal Revenue Agent Boyd to work with Special Agent Rogers and investigate approximately thirty persons with regard to tax, and which letter referred to the "Jack Chase case."

Plaintiff further states that on January 29, 1941, he made and filed with the Bureau of Internal Revenue his claim for reward for giving such information under Treasury decision 4663 for ten percent of the amount recovered, and that on May 31, 1941, the Commissioner of Internal Revenue disallowed the said claim in its entirety by a letter mailed to plaintiff.

The question presented by the facts alleged in the petition has been decided adversely to the claim made by plaintiff in *Gordon* v. *United States*, 92 C. Cls. 499, 500, and *Katzberg* v. *United States*, 93 C. Cls. 281, 282. Plaintiff's allegation that Internal Revenue Agents Boyd and Rogers orally promised him that if he would give information of the character described he would be rewarded by the Commissioner in accordance with T. D. 4663 in the amount of ten percent of the amount of tax and penalties recovered, cannot be treated as an agreement expressed or implied by the Commissioner to pay any definite sum (*Katzberg* v. *United States*, *supra*, p. 282). The agents could not, in the absence of express authority, bind the Commissioner in the manner suggested, and since the only offer of the Commissioner was in T. D. 4663 which specifically stated that he would pay such reward "as he may deem necessary," plaintiff is not entitled to recover upon the facts alleged. *Montgomery Ward & Co. et al.* v. *United States*, 94 C. Cls. 309, 310–313.

The demurrer is sustained and the petition is dismissed. It is so ordered.

CASES DECIDED

IN

THE COURT OF CLAIMS

February 1, 1945, to June 30, 1945

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 45977. FEBRUARY 5, 1945

Ellsworth W. Frohmader.

Claim for overtime pay in Customs Service; judgment on the basis of decision in *United States* v. *Myers*, 320 U. S. 561.

In accordance with a stipulation filed by the parties in which the plaintiff withdrew from the claim in the instant case all claim for that portion of the account sued upon, amounting to $134.44, which represented plaintiff's claim for services performed during weekdays in excess of 8 hours on those days when such hours were served between the hours of 8 a. m. and 5 p. m.; the defendant consenting to such withdrawal; and in which it was stipulated that by the custom house records at Detroit there was due the plaintiff for services performed on Sundays and holidays, including services in excess of 8 hours on those days, from September 29, 1937, to February 26, 1944, inclusive, upon the basis of the ruling in *United States* v. *Myers*, the sum of $2,832.24; and upon a report by a commissioner of the court recommending judgment for the plaintiff in the agreed sum, it was ordered, February 5, 1945, that judgment be entered for the plaintiff in the sum of $2,832.24.

No. 45011. FEBRUARY 5, 1945

The Mississippi Valley Trust Company, Executor.

Government contract for construction of lock; settlement on offer of compromise.

In accordance with a stipulation filed by the parties, and a report by a commissioner of the court recommending that judgment be entered for the plaintiff in the sum of $5,000.00, and on plaintiff's motion for judgment, it was ordered, February 5, 1945, that judgment be entered for the plaintiff in the sum of $5,000.00.

No. 43058. MARCH 5, 1945

United States Airways, Inc.

Air mail contracts; agreement by operaotrs; annulment under section 3950, Revised Statutes.

Following the decision in Pacific Air Transport, No. 43029, and allied cases Nos. 43030, 43031, 43032, and 43033 (98 C. Cls. 649), and upon plaintiff's offer to compromise the claim on the basis of the pay for air mail transportation earned but unpaid at the time of cancellation and the entry of judgment dismissing the defendant's counterclaim; and upon agreement of the parties to such settlement; and upon a report of a commissioner of the court as to the amount due in accordance therewith and recommending that judgment be entered for the plaintiff in the sum of $18,077.18 and that judgment be entered dismissing defendant's counterclaim; it was ordered March 5, 1945 that judgment for the plaintiff be entered for $18,077.18 and that the defendant's counterclaim be dismissed.

No. 45197. MAY 7, 1945

Lena Rosenman and the National City Bank of New York, Executors.

Estate tax; statute of limitation; timely claim for refund.

Decided February 7, 1944; plaintiffs entitled to recover $10,497.34 with interest. Opinion 101 C. Cls. 437; judgment entered 101 C. Cls. 451.

Reversed by the Supreme Court January 29, 1945, 323 U. S. 658.

In accordance with the opinion and mandate of the Supreme Court, and a stipulation of the parties showing the amount due thereunder, it was ordered, May 7, 1945, on plaintiffs' motion for judgment, that judgment for the plain-

tiffs be entered in the sum of $23,099.80 with interest as provided by law on $12,602.46 from April 15, 1938, and on the balance of $10,497.34 from April 22, 1938.

No. 46278. MAY 7, 1945

R. McGray.

On defendant's plea to the jurisdiction of the court, plaintiff's petition was dismissed in an opinion *per curiam*, as follows:

> Plaintiff is not entitled to recover. He signed a contract which gave the defendant the option to purchase his equipment on a certain basis. That option was exercised, and without demur plaintiff executed a bill of sale for the equipment.
>
> Defendant's plea is sustained and plaintiff's petition is dismissed. It is so ordered.

No. 45067. MAY 7, 1945

Willow River Power Company.

Navigable stream; taking; damages; navigability a Federal question.

Decided February 7, 1944; plaintiff entitled to recover. Defendant's motion for new trial overruled May 1, 1944. Opinion 101 C. Cls. 222.

Reversed by the Supreme Court March 26, 1945, 324 U. S. 499.

In accordance with the opinion and mandate of the Supreme Court the petition was dismissed.

No. 44978. JUNE 7, 1945

Joseph H. Beuttas, John W. Beuttas and Paul H. Beuttas, Trading as B-W Construction Co., Not Inc.

Government contract; provision for adjustment of contract price if minimum wage rates provided for were changed; indirect change in rates by fixing higher rates on another portion of the building.

Judgment for the plaintiff June 5, 1944. Opinion 101 C. Cls. 748.

Reversed in part and affirmed in part by the Supreme Court April 23, 1945, 324 U. S. 768.

In accordance with the opinion and mandate of the Supreme Court, it was ordered June 7, 1945, that judgment be entered for the plaintiff for the difference between $13,388.27, as formerly entered, and $3,751.83 deducted by the Supreme Court, or $9,636.44.

No. 44644. JUNE 7, 1945

George Washington Pierce.

Letters patent Nos. 2,014,410; 2,014,411; 2,014,412; 2,014,413, and 2,063,946.

Agreement by plaintiff granting to the Government to make and have made, and to use and have used for Government purposes all inventions, apparatus, devices and equipment, and waiving all rights, etc.

On defendant's motion, there being no appearance for the plaintiff, the petition was dismissed.

JUDGMENTS ENTERED UNDER THE ACT OF JUNE 25, 1938

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197), and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Act:

ON MARCH 5, 1945

No. 44054. E. M. Oettinger, J. R. Oettinger, Copartners, trading as Oettinger Lumber Company________ $1,667.50

No. 44310. The J. B. McCrary Company, a Corporation____ 1,000.00

ON APRIL 2, 1945

No. 44538. Decatur Iron & Steel Co______________________ 4,000.00

ON MAY 7, 1945

No. 44509. Wilbur Coal Mining Company________________ 5,094.43

ON JUNE 4, 1945

No. 44229. Byus-Mankin Lumber Co______________________ 953.00

Customs Service Pay Cases

Extra pay for overtime; customs employees; meaning of "overtime" under the statute.

On the basis of the opinion and mandate of the Supreme Court in the case of *Howard C. Myers* (No. 43671) *et al.*, 320 U. S. 561, and following the order of the Court of Claims therein, 101 C. Cls. 859; and upon stipulations of the parties in the cases set forth below, showing the amount due each of the plaintiffs in accordance with accountings made therein, and upon the report of a commissioner in each case recommending that judgment be entered in favor of the plaintiffs for the respective amounts stated in the several stipulations, and on motions by the several plaintiffs for judgment, it was ordered that judgment be entered in the respective amounts set forth below, as follows:

ON JUNE 4, 1945 AND JUNE 7, 1945

43676	Herman S. VanZandt	$3, 431. 00
43677	Earl A. Bushey	1, 767. 73
43678	Edward D. Cotton	3, 033. 56
43679	Charles H. Dudley	2, 830. 62
43680	James A. Fry	2, 425. 80
43681	John L. Mahon	2, 834. 88
43682	Andrew W. Samson	2, 751. 89
43683	Glenn L. Hall	2, 811. 94
43684	Joseph A. Yager	1, 743. 09
43685	Ellsworth M. Frohmader	2, 587. 10
43686	Francis J. Doolin	2, 987. 62
43687	Raymond J. Byers	2, 830. 21
43688	Kermit R. Way	2, 758. 48
43689	Byron E. Redick	3, 681. 33
43716	Thomas Edwards	2, 739. 67
43717	Edward P. Cullinan	2, 752. 53
43718	Donald K. Atterholt	2, 668. 85
43719	Samuel H. Flanigan	1, 531. 18
43720	Stewart A. Sharrow	2, 382. 80
43721	Clifford W. Snell	2, 560. 68
43722	John D. Harriman	3, 190. 36
45351	William H. Annette	4, 209. 61
45352	Roscoe B. Ballard	3, 399. 97
45353	Max I. Bowers	1, 365. 35
45354	Max Bower, Admr	1, 163. 68
45355	James P. Broderick	3, 427. 04

45356	Alice B. Buck, Admx	$1,677.86
45357	Charles E. Christley	2,250.60
45358	Leonard K. Cohen	2,534.52
45359	Ashton R. Daly	4,616.83
45360	Ivan L. Doty	2,668.95
45361	Harvey W. Ernest	4,559.69
45362	Charles O. Fisher	2,399.50
45363	Glen L. Flaten	2,077.07
45364	Oscar H. Grunow	4,419.51
45365	Albert L. Herrick	1,918.97
45366	Clare B. Hopper	3,445.83
45367	Roy J. Johnson	3,694.23
45369	Theodore H. Laskey	2,417.33
45370	Hayden M. Mathews	5.379.47
45372	Fred Megenity	3,296.93
45373	Harley C. Miller	3,339.91
45374	Earl F. Morden	3,251.46
45375	Walter L. Morrison	1,198.66
45376	Harry E. Northrup	2,188.20
45377	Paul T. Olivier	5,179.74
45378	Jack R. Omick	2,199.31
45379	Martin C. Osberg	3,953.64
45380	Manley L. Percey	5,236.18
45381	Albert E. Pollard	2,451.26
45382	Herbert D. Rhodes	3,593.34
45383	Max L. Segar	2,937.66
45384	Alvin C. Sherwood	2,880.98
45385	Frank Shevchik	4,293.91
45386	Louis G. Stuhldreher	3,361.82
45387	Clarence C. Terry	2,953.22
45388	Walter Trominski	3,057.86
45389	Harry R. Walker	1,731.55
45390	Raymond Walker	1,108.87
45391	George I. Williams	2,213.16
45392	John Wilson	3,711.00
45461	Dell Corey, Admx	268.84
45462	Robert S. Hunt	2,799.25
45464	Earl Munro	279.64
45483	Donald F. Bathey	1,557.13
45484	Omar D. Brown	1,473.69
45485	Carl F. Carlstrom	4,177.14
45486	Eleanor M. Drake, Admx	11.66
45487	Albert W. Goschnick	2,010.06
45488	Archibald W. Loughrin	4,967.23
45489	Joseph J. Masserant	1,829.13
45491	Paul H. Phillips	2,010.54
45492	Joseph A. Roesch	1,541.68

45493	Raymond B. Spencer	$2,505.25
45494	Lawrence J. Sernett	3,122.61
45495	Marguerite Sullivan, Admx	2,085.00
45496	Walter R. Wagner	4,636.60
45497	Harry Ohs	2,443.26
45520	Clair Petit	1,901.88
45573	Roy S. Wagner	2,003.96
45574	Sherman K. Willard	889.45
45575	Carl Wohlberg	2,899.17
45576	William H. Ellis	647.15
45577	Walter Whittle, Jr	889.20
45656	Stuart W. Sherwood	4,788.55
45834	Charles O. Decker	2,443.62
45837	Harold J. Goodman	2,422.64
45878	Roy M. Fisher	1,500.56
45879	James L. Joyce	2,179.21
45897	Albert C. Harrington	55.91
45906	Robert S. Millne	1,195.75
45969	John H. Arble	1,972.78
45970	Donald K. Atterholt	1,725.15
45971	Earl A. Bushey	860.71
45972	Raymond J. Byers	2,404.78
45973	Edward D. Cotton	3,127.98
45974	Francis J. Doolin	1,947.00
45975	Thomas Edwards	1,441.98
45976	Samuel H. Flanigan	489.72
45978	James A. Fry	2,286.35
45979	Glenn L. Hall	1,915.72
45980	John L. Mahon	2,459.14
45981	Charles C. Martin	2,453.01
45982	Howard C. Myers	2,332.58
45983	Byron E. Redick	3,496.03
45984	Andrew W. Samson	2,660.79
45985	George H. Spitz	1,938.70
45986	Joseph A. Yager	727.24
46021	Wilbert A. Ross	1,758.15
46082	John D. Harriman	2,245.96
46083	Hiram D. Gray	668.48
46110	Joseph H. Chamberlain	2,932.93
45840	Richard W. Hirzel	2,884.45
45866	Calvin W. Williamson	473.58
45893	Edward H. Cunningham	1,060.28
45896	Larry L. Hall	3,545.78
45900	William P. Kennon	723.04
45905	Albert O. Miller	3,551.86
45907	Jack V. M. Oldham	490.48
45919	Virgil E. Darr	3,590.15

45920	Ernest A. Loudon	$521.18
46022	Willard S. Titus	454.74
45958	Edgar J. McSorley	1,578.03
45959	Hale Kore	2,293.30
45960	Ernest O. Kendall	3,605.33
45961	Robert T. Carson	1,433.02
45962	Marvin J. Shefferly	2,002.66
45963	Edison O. Gibson	3,525.97
45964	Howard S. Williams	3,127.52
45965	Gerald B. Brauch	2,404.07
45966	Theodore S. Taipalus	1,668.29
45967	Grant W. Livingston	2,166.37
45368	Roy J. LaRose	4,016.99
45371	Hugh K. McCarthy	4,054.95
45490	Allen Phillips	1,887.08
45833	John L. Cross	2,469.59
45842	Ralph C. Hughes	2,953.23
45844	Thomas L. H. Jennings	2,141.29
45898	Harry I. Hood	244.86
45899	Clyde Kelso	283.25
45901	Hugh E. Killin	1,037.74
45902	Leo Antoine LaBelle	361.46
45904	Edward R. McNabb	1,547.68
45908	Ralfred D. Snowball	402.30
45918	Joseph L. Burden	310.57
45921	Gordon F. Stark	1,495.84
45942	Roy N. Crowder	340.48
46010	Walter O. Plitz	1,801.53
46111	Joseph C. Rychlicki	2,357.42
43723	Lawrence Dahlin	2,189.88
45895	Herbert Dietrich	962.34
45894	Wilburn C. DeWeese	1,832.18
46134	Robert A. Bard	1,889.35
46135	James D. Barnhardt	1,009.49
46136	Charles A. Bement	835.76
46138	Robert J. Brennan	2,846.60
46140	Mac V. Carson	2,015.28
46141	Charles G. Castilon	2,129.70
46142	John F. Cogan	2,071.64
46143	Edward Cohen	641.96
46144	Orson T. Conrad	1,627.55
46145	James J. Considine	3,012.78
46147	William D. Cronin	2,595.85
46148	Theodore H. Culver	2,295.82
46149	Gerald J. Daley	1,226.18
46150	Frank R. Daly	883.56
46151	Vincent M. DiSota	706.96

46152	William F. Dolan	$3,010.93
46153	George L. Damroes	1,274.18
46154	Clair James Dargan	3,278.76
46155	Delbert E. Forrester	1,541.11
46157	Hugh J. Gallagher	2,977.16
46158	Millard A. Gibson	276.02
46159	Charles B. Grass	2,437.29
46163	Stuart S. Hooper	1,567.85
46164	Fred F. Houston	1,480.04
46165	Ray R. Johnson	2,786.44
46167	Thomas Kelly	2,018.69
46168	Richard R. Kitchen	1,750.01
46170	Arthur N. Kusmierski	1,185.70
46171	Leon C. LeVan	1,295.48
46172	William R. Lynch	2,281.09
46174	George E. Mahoney	2,586.71
46175	George T. McGreevy	1,017.34
46176	Harry L. Metzger	3,055.53
46177	George Mueller	1,001.94
46178	Joseph Muldoon	116.60
46179	Richard A. Nagel	2,133.53
46181	Stanley J. Nugent	1,236.42
46182	Edward V. O'Neill	3,068.26
46183	Francis R. Overend	2,836.76
46184	Frederick A. Peckham	1,180.58
46185	Howard E. Rigby	2,655.14
46187	Hubert A. Schmitz	978.97
46188	Eligius J. Schneggenburger	2,440.14
46189	Horace R. Schroeder	2,750.08
46190	Francis M. Shay	2,733.41
46191	Howard W. Simpkins	2,716.20
46192	William Z. Spalding	1,941.18
46193	Rodney G. Spence	1,907.85
46194	Warren A. Swick	2,858.95
46195	Howard W. VanRiper	1,060.67
46196	Carl G. Wickman	3,046.62
46197	Charles D. Williams	2,777.88
46215	Albert J. Blake	1,899.83
46216	Donald W. Brennen	1,091.30
46217	Ralph H. Deering	2,178.10
46218	William E. Feeley	2,168.88
46219	Philip C. Hoffman	2,276.94
46220	Leonard Ingham	2,001.27
46222	Roy E. Littlefield	1,423.97
46223	John A. Mack	781.22
46224	John F. Mooney	1,866.74
46225	Harry J. Stearns	2,185.89
46246	Raymond S. Carter	1,895.60

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON FEBRUARY 5, 1945

45914. Marian Gross and Lena Cohen.

ON MARCH 5, 1945

45233. Arthur A. Acklin.
45682. United States Gypsum Company.
45949. United States Gypsum Company.
46011. St. Louis Union Trust Company.

ON APRIL 2, 1945

46105. Rex-Hanover Mills Company.

ON MAY 7, 1945

46001. F. Leslie Tompkins, et al.

ON JUNE 4, 1945

45927. National Savings and Trust Co. et al.
46043. Sidney C. Erlanger, et al.
46107. Tide Water Associated Oil Co.

Cases Pertaining to Government Contracts

ON FEBRUARY 5, 1945

45406. Caravel Industries Corporation.
45412. Caravel Industries Corporation.
45435. Caravel Industries Corporation.
45506. Caravel Industries Corporation.*

ON APRIL 2, 1945

46368. Van Doren Iron Works Co.

ON MAY 7, 1945

46248. The First National Bank of Merrick, N. Y.

*Defendant's counterclaim dismissed.

Cases Pertaining to Transportation Charges

ON MAY 7, 1945

44683. The Pennsylvania Railroad Co.

44684. The Long Island Railroad Co.

Case Involving Indian Claim

ON MAY 7, 1945

L–267. Cherokee Nation.

Case Involving Pay and Allowances

ON MARCH 5, 1945

45549. William L. McRaven, Jr.

Cases Pertaining to Flood Control

ON JUNE 30, 1945

(Following the decisions in *Creech* v. *United States*, et al., Nos. 44729, 44730, and 44731, 102 C. Cls. 301; certiorari denied, 325 U. S. 870):

44698. Ross Winne and Gertrude Winne.
44699. Tropical Produce Corporation.
44700. Knight & Company, Inc.
44701. C. J. Aspey.
44702. R. A. Morris and L. E. Aspey.
44703. Lloyd E. Aspey.
44704. B. A. Morris.
44705. Walter T. Danson.
44706. Lonnie A. Knight.
44707. Roy E. Hudson.
44708. B. A. Dopcus.
44709. W. B. Shepherd.
44710. J. W. Ives.
44711. Rawls Bros.
44712. D. Shiver.
44713. T. A. Lee.
44714. J. D. Lee.
44715. W. P. Shepherd.
44716. Frede Aunapu.
44717. Warthen Bros.
44718. F. A. LeFils.
44719. C. J. Barstow.
44720. C. E. Thomas.
44721. Edward Forbes.
44722. E. B. Steele.
44736. Ruth S. Wedgeworth and Joseph D. Farrish, Admr's.
44737. M. M. Richards.

Miscellaneous

ON MARCH 5, 1945

45761. Lemuel T. Root, Jr.

ON JUNE 9, 1945

46315. John Jacob Janzen.



REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

February 1, 1945, to June 30, 1945, inclusive

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS, PETITIONERS v. THE UNITED STATES

[No. M–107]

[95 C. Cls. 642; 100 C. Cls. 455; 324 U. S. 335]

On writ of certiorari (322 U. S. 721) to review a judgment of the Court of Claims, January 3, 1944, holding that since offsets to which, under the Special Jurisdictional Act (45 Stat. 1407), the defendant was entitled exceed the amount which the court had found to be due to plaintiff bands by defendant, plaintiffs were not entitled to a judgment against the defendant.

The judgment of the Court of Claims was *affirmed* by the Supreme Court on March 12, 1945, Mr. Justice Reed delivering the opinion.

The syllabus of the Supreme Court's decision, 324 U. S. 335, is as follows:

> 1. The treaty of July 30, 1863 with the Northwestern Bands of the Shoshone Indians was not a recognition or acknowledgment by the United States of the Indian title to the lands therein mentioned; therefore a claim to compensation for the taking of the lands is not one "arising under or growing out of" the treaty, within the meaning of the special jurisdictional Act of February 28, 1929, and no recovery upon such claim can be had under that Act.

(a) The finding of the Court of Claims that the United States did not by the treaty intend to recognize or acknowledge Indian title to the lands, which finding was the basis of that court's decision, places the burden on petitioners to overthrow the judgment of the Court of Claims.

(b) Recognition of the Indian title is not to be implied from the grant by the Indians of permission for travel or mining and for the maintenance of communication and transportation facilities.

(c) That Indian title was recognized by the Fort Laramie treaty does not require the conclusion that Indian title was recognized by the treaty of July 30, 1863.

(d) Use in the treaty of the word "claim" or the phrase "country claimed," though designating the area over which the Indians asserted Indian title, did not constitute acknowledgment by the United States of such title.

(e) The Senate amendment to the treaty—"Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof"—was not intended to give recognition to Indian titles but only to avoid further complications in the Mexican Cession title situation.

2. Indian treaties are to be construed according to their tenor; and their terms are not to be varied by construction in order to avoid alleged injustices.

Mr. Justice Roberts was of the opinion that the judgment of the Court of Claims should be reversed.

Mr. Justice Jackson filed a separate opinion, in which Mr. Justice Black joined, concurring in the opinion by Mr. Justice Reed.

Mr. Justice Douglas filed a dissenting opinion in which Mr. Justice Frankfurter and Mr. Justice Murphy joined.

Mr. Justice Murphy filed a dissenting opinion in which Mr. Justice Frankfurter and Mr. Justice Douglas concurred.

THE UNITED STATES, PETITIONER v. WILLOW RIVER POWER COMPANY

[No. 45067]

[101 C. Cls. 222; 324 U. S. 499]

On writ of certiorari to the Court of Claims (323 U. S. 694) to review an award of damages against the United States for impairment of the efficiency of the plaintiff's hydroelectric plant caused by the reduction of the operating head as a result of an improvement of navigation.

The judgment of the Court of Claims was *reversed* by the Supreme Court March 26, 1945, Mr. Justice Jackson delivering the opinion.

A summary of the Court's decision is as follows:

1. The interest which a riparian owner, operating a hydroelectric plant on an artificial channel between a nonnavigable and a navigable stream, has in having its tail waters flow off unobstructed into the navigable stream, so as to enable it to maintain its power head, is not such a legal right as to require compensation, as for a "taking," upon its impairment by the raising of the high-water level of the navigable stream by a Government dam erected downstream to improve navigation resulting in impounding waters at a higher level at the end of the plant's discharge lines.

2. The Fifth Amendment requiring just compensation for the taking of private property for public use does not undertake to socialize all losses, but only those which result from a "taking" of "property," no compensation being awarded for damage from other causes except by Act of Congress.

3. Only such economic interests as have the law back of them may properly be called "property rights."

4. Although the right of ownership in land may carry with it the legal right to enjoy some benefits from adjacent waters, this does not mean that an abstract and absolute property right in water, good against all the world, hovers over the shore land.

5. Under Wisconsin law, the shore owner has title to the bed of a navigable stream.

6. A riparian owner on a navigable stream who, by utilizing an artificial channel carrying into the navigable

stream the waters of a parallel nonnavigable stream, creates an artificial water level for the purpose of a hydroelectrical plant the tail waters from which were discharged into the navigable stream, cannot, in aid of his position as riparian owner on the navigable stream, claim rights also as riparian owner of the nonnavigable stream, where its property thereon is riparian only to the artificial channel.

7. Equality of right between riparian owners is the essence of water law, each owner having an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other owners likewise to make a reasonable use.

8. Riparian owners on nonnavigable streams are entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality.

9. While riparian owners on navigable streams have the same rights to be free from interferences of other riparian owners as on nonnavigable streams, all such riparian interests are subject to the dominant public interest in navigation. *United States* v. *Cress*, 243 U. S. 316, distinguished.

10. A riparian owner has no right of ownership, which may be asserted by him as against an improvement of navigation authorized by Congress, in the difference between the natural level of a navigable stream and an artificial level of water impounded by him.

11. Lands below the high-water mark on a navigable stream are always subject to a dominant servitude in the interest of navigation, the exercise of which calls for no compensation to the riparian owner.

12. The rights existing between riparian owners are not the measure of their rights as against the Government in the improvement of navigation, in which case private interests must give way to a superior right.

13. Damage suffered by riparian owners as the result of operations of the Government in aid of navigation is not compensable under the Fifth Amendment unless there has been an actual taking of property.

14. Damages cannot be recovered for injury to abutting property resulting from a change of grade authorized by law, where there is no physical injury to the property itself.

Mr. Justice REED concurred in the result "on the ground that the United States has not taken property of the respondent."

Mr. Justice ROBERTS filed a dissenting opinion, holding that the judgment of the Court of Claims should be affirmed, in which Mr. Chief Justice Stone concurred.

THE UNITED STATES, PETITIONER v. JOSEPH H. BEUTTAS, ET AL., TRADING AS B-W CONSTRUCTION CO.

[No. 44978]

[101 C. Cls. 748; 324 U. S. 768]

On writ of certiorari (323 U. S. 702) to review a judgment of the Court of Claims that the Government was liable for the increased costs where the respondents had contracted with the Government to construct the foundations of a public housing project, the terms of the contract allowing an adjustment in price if the Government directed that higher wages be paid. Respondents paid higher wages then specified because its employees demanded increases upon the knowledge that workers employed on the superstructure would receive higher pay. The Government was held liable on the ground that by its advertisement for bids on the superstructure, specifying higher wages, it caused the wage raise granted by the respondents.

The judgment of the Court of Claims was, on April 23, 1945, *affirmed in part* and *reversed in part* by the Supreme Court.

Mr. Justice ROBERTS delivered the opinion of the Supreme Court, holding that the Government had not availed itself of the option to set higher wage rates for the work covered by the contract nor was it the direct cause of the increase, since the fixing of a wage rate under another contract for a separate portion of the project at another time formed no basis for deliberate hindrance of performance of respondents' contract.

As to the item of increased wage costs, the judgment of the Court of Claims was *reversed;* in other respects it was *affirmed.*

PIERCE OIL CORPORATION, ET AL., PETITIONERS v. THE UNITED STATES

[No. 45442]

[102 C. Cls. 360; 325 U. S. 865]

Income tax; finality of compromise settlement; excess interest under section 821 of Revenue Act of 1938; legislative history of section 821; intent of Congress.

Plaintiff's petition for writ of certiorari was *denied* by the Supreme Court May 28, 1945.

THE MASSMAN CONSTRUCTION COMPANY, A CORPORATION, PETITIONER, v. THE UNITED STATES

[No. 45765]

[102 C. Cls. 699; 325 U. S. 866]

Government contract; error in preparation of bid discovered and disclosed before signing of contract; neither unilateral nor mutual mistake to justify reformation of contract.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 28, 1945.

STANDARD ACCIDENT INSURANCE CO., PETITIONER, v. THE UNITED STATES

[No. 43808]

[102 C. Cls. 770; 325 U. S. 870]

Government contract; surety on contractor's performance bond has right to sue for excess costs where surety completes contract upon termination for failure to proceed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court June 4, 1945.

ROBERT Y. CREECH, C. H. THOMAS ET AL., SHORE ACRES PLANTATION, INC., PETITIONERS, v. THE UNITED STATES

[Nos. 44729, 44730 and 44731]

[102 C. Cls. 301; 325 U. S. 870]

Flood control; Government not liable, as for a taking, for consequential damages; proof insufficient under provisions of Special Jurisdictional Act.

Plaintiffs' petitions for writs of certiorari *denied* by the Supreme Court June 4, 1945.



INDEX DIGEST

AGRICULTURAL ADJUSTMENT ACT.

I. Where, in carrying out the purposes of the Agricultural Adjustment Act (48 Stat. 31) the Government, through the Secretary of Agriculture, duly authorized the plaintiff, under a "Marketing Agreement for Disposal of North Pacific Wheat Surplus," to sell to the Chinese Government, for export, at stated prices specified quantities of wheat, in the form of wheat or flour, and where it was further provided that if the wheat or flour so sold was not accepted for shipment and loaded on or before certain specified dates, in each sale, there should be collected from the purchaser a carrying charge of ⅙ cent per barrel per day; it is *held* that this carrying charge was not a part of the sales price and it was not the intention of the parties that such carrying charges should be used to reduce or offset any payments that might be made by the

CONTRACTS—Continued.

dates, where the plaintiff, when making its bid knew they would not be ready; and there was no breach of the contract, for which the plaintiff might recover, when the foundations were not completed on the dates specified, and plaintiff was, at its request, given additional time because of the delay. *Id.*

XXI. Where, after the plaintiff had admittedly full knowledge of the facts, it materially changed the offer contained in its bid, by reducing the number of days in which it would agree to complete the work; and where plaintiff's real and final offer, which was accepted and became the basis of the contract, was thus made with complete knowledge; it is *held* that thereupon the specifications for the completion of the foundations passed completely outside the contemplation of the contract, and the fact that the foundations were not ready on the dates originally specified did not constitute a breach of the contract by the defendant, and the plaintiff is not entitled to recover. *Id.*

XXII. Where, even if contractor did not have complete knowledge of the facts at the time its bid was submitted but did have complete knowledge before bid was accepted and contract was signed; there can be no recovery on the ground of misrepresentation of conditions by the defendant. *Id.*

XXIII. Where plaintiffs entered into a contract with the Government for the construction and delivery of glass roof skylights to be installed on a W. P. A. project; and where it is shown that the plaintiffs failed to perform their contract and that after due notice the defendant secured the skylights from other sources, with the usual process of advertising and bidding, at a cost in excess of plaintiffs' bid; it is *held* that plaintiffs are not entitled to recover and that the defendant is entitled to recover on its counterclaim. *Empire Vault Co.*, 237.

XXIV. Following the decision in *Plumley* v. *United States*, 226 U. S. 545, and *McShain* v. *United States* (No. 43084), 308 U. S. 512, 520, it is *held* that the decision of the contracting officer was final under the terms of the contract where

CONTRACTS—Continued.

XLII. It is one of the recognized customs in the construction industry, as shown by the evidence in the instant case, to base specifications and bids, with reference to excavations, on earth excavation, which is easy to calculate, leaving the matter of payment for such excavation of rock as may be necessary to adjustment on the basis of separate unit prices, or by some other method, and the Government frequently adopts this practice. *Dewey Schmoll et al.* v. *United States*, 93 C. Cls. 572, 575; *Union Engineering Co., Ltd.* v. *United States* 97 C. Cls. 424, 429, 430; *John M. Whelan & Sons, Inc.* v. *United States*, 98 C. Cls. 601, 617; *Rego Building Corp.* v. *United States*, 99 C. Cls. 445, 452, 459. *Id.*

XLIII. In view of the specific provisions of the specifications and the interpretation of the parties, the Standard "Examination of the site" provision, contained in paragraph 16 of the General Conditions of the Specifications of the contract in suit, is not controlling in the instant case. *Id.*

XLIV. The allowance of payment for the 507.9 cubic yards of rock excavation as an extra does not result in a double payment to plaintiff for "excavation," since plaintiff based its bid on earth and gravel excavation, but as this rock excavation displaced an equal amount of earth excavation deduction therefor is made in the amount of the judgment entered. *Id.*

XLV. Under the provisions of the Act of February 27, 1909 (35 Stat. 658) providing for the leasing of lands in the Canal Zone on condition that leases entered into under the act were revocable at the option of the United States, under certain conditions, plaintiff in 1923 obtained a lease on a given tract of land, and paid the agreed purchase price of the improvements thereon. In 1939, the Governor of the Canal Zone, in accordance with the statute and the terms of the lease, cancelled the lease and offered to plaintiff $818.00 as the appraised value of the improvements, which plaintiff refused to accept, and brought suit for the reasonable value of the improvements. It is *held* that plaintiff is entitled to recover $907.00 as the reasonable value of the improvements, representing the value of the usable materials in the remaining

INDIAN CLAIMS.

I. Where the first claim in the instant suit arises under a presumed treaty or agreement of July 15, 1794, which cannot be located either in the original or in the form of a copy, but the existence of which is evidenced by references thereto in various appropriation acts acknowledging the obligation of the Government in accordance therewith to pay to the plaintiff an annuity of $3,000 in goods; it may not be said that Congress violated the unknown terms of the treaty or agreement by making no appropriations for such annuity prior to the appropriation for 1798 (1 Stat. 563, 564); and hence, the claim of $10,500 for the last half of the year 1794, and for the years 1795, 1796, and 1797 is without support and is not allowed. *Chickasaw Nation, K–544.* 1.

II. The treaty or agreement of July 15, 1794, was recognized by the Congress only insofar as appropriations were made, and it is to be given limited effect accordingly; recognition by the Court is proper notwithstanding lack of proof as to ratification. See *Moore* v. *United States*, 32 C. Cls. 593. *Id.*

III. Where it is shown that for the years 1798, 1799, and 1800 goods of the annuity values were forwarded for the Chickasaw Nation, it must be presumed that they were received in due course; the burden is upon the plaintiff to prove its case. *Id.*

IV. While the jurisdictional act waives the "lapse of time," it does not thereby shift the burden of proof to the defendant nor excuse the absence of proof by the plaintiff. *Id.*

V. It must also be presumed that the goods forwarded were paid for out of the appropriations made in fulfillment of the supposed treaty or agreement. *Id.*

INDIAN CLAIMS—Continued.

XXX. Notwithstanding the defect in the petition, it is further *held* that the evidence submitted is not sufficient to show that any of the named seven tribes has a legal or equitable claim for compensation against the United States. *Id.*

XXXI. The Executive Order of November 9, 1855, under which there was set aside for the Indians the "Coast Reservation", consisting of an area 120 miles north and south along the coast of Oregon by 20 miles east and west, was a conditional reservation or a withdrawal of public land from white settlement, subject to further curtailment or reduction if found proper by the President or to entire withdrawal as a reservation for Indians should Congress not sanction, as advisable, the purpose of the reservation. *Id.*

XXXII. Where it is shown by subsequent actions, by the President in the Executive Order of December 21, 1865, and by Congress in the Acts of March 3, 1875 (18 Stat. 420), February 8, 1887 (24 Stat. 388), August 15, 1894 (28 Stat. 286, 323) and May 13, 1910 (36 Stat. 367), that the President and the Congress at all times until 1894 regarded the original "Coast Reservation" described by the Executive Order of November 9, 1855, as a conditional or temporary reservation for Indian purposes; it is *held* that none of the plaintiff tribes or bands placed on the Coast Reservation, including the Tillamook Tribe, became entitled, under the Executive Order of November 9, 1855, to recover compensation, as for a taking of land to which they had exclusive use and occupancy title under approval and recognition by Congress, when the "Coast Reservation", as originally defined by the 1855 Executive Order, was subsequently in 1865 and 1875 curtailed or diminished. *Sioux Tribe of Indians*, 94 C. Cls., 150; affirmed 316 U. S. 317. *Id.*

XXXIII. Where by the enactment of section 15 of the Act of August 15, 1894 (28 Stat. 286, 323, 324) approving an agreement ceding 178,840 acres for $142,600, Congress then and thereafter approved and recognized the Coast Reservation as it existed immediately prior thereto as beneficially belonging to the Indians thereon; and where thereafter Congress did not take any part

INDIAN CLAIMS—Continued.

of the reservation without compensation; it is *held* that the Umpqua, Chinook, Clatsop and the Ne-ha-lum tribes and the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians are not entitled to recover. *Id.*

XXXIV. Further, the Umpqua Tribe is not entitled to recover because it is expressly excluded under clause (b) of the Jurisdictional Act. *Id.*

XXXV. The Chinook, Clatsop and Ne-ha-lum tribes are not entitled to recover as for a taking of lands to which they may have had original Indian title for the further reason that their unratified treaties made in 1851 are not included in the Jurisdictional Act, and also for the reason that under the Acts of June 7, 1897 (30 Stat. 62) and August 24, 1912 (37 Stat. 518,535) they were paid various sums by Congress which were accepted by them in full of all demands or claims against the United States. *Klamath* and *Moadoc Tribes* of *Indians, et al* v. *United States*, 81 C. Cls. 79, affirmed 296 U. S. 244, cited. *Id.*

XXXVI. The Willamette Tribe of Indians, included in the petition, were not brought to or placed upon the Coast Reservation, and they cannot, therefore, sue under clause (a) or (b) of the Jurisdictional Act or under the Executive Order of November 9, 1855. *Id.*

XXXVII. Where consent to be sued on the basis of original Indian title has been given by Congress, as in the instant case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is "a question of fact to be determined as any other question of fact." *United States*, as *Guardian* of *the Hualpai Indians of Arizona*, v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, cited. Cf. *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347; *Coos Bay, Lower Umpqua* and *Siuslaw Indian Tribes* v. *United States*, 87 C. Cls. 143. *Id.*

XXXVIII. Where consent to be sued has been given by Congress limited to a claim or claims, arising under or growing out of a treaty, agreement or act of Congress, proof of aboriginal use and occupancy title is not necessary when such

INDIAN CLAIMS—Continued.

treaties, agreements or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been, or is, set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476. *Id.*

XXXIX. Where the consent to be sued is limited to a claim, or claims, arising out of a treaty which is only a treaty of peace and amity, and which does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the Court of Claims is without authority to determine, adjudicate and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530; *Crow Nation* v. *United States*, 81 C. Cls. 238; 269 U. S. 281; *Wichita Indians* v. *United States*, 89 C. Cls. 378; *Northwestern Bands* v. *United States*, 95 C. Cls. 642, affirmed 324 U. S. 335. *Id.*

XL. Where the right to sue is limited to a claim, or claims, arising out of a treaty, or treaties, even if the proof is sufficient to show that the tribe, or tribes, concerned had original Indian title, through use and occupancy to the exclusion of other Indian tribes, the court cannot enter judgment on the basis of such original title. *Northwestern Bands* v. *United States*, 95 C. Cls. 642; affirmed 324 U. S. 335. *Id.*

XLI. The United States has always recognized that the Indians had a beneficial ownership in lands exclusively occupied by them. *Johnson and Graham's Lessee* v. *William M'Intosh*, 8 Wheat. 543; *Cramer et al* v. *United States*, 261 U. S. 219; *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339. *Id.*

XLII. The United States possessed the power to take possession of Indian lands, whether justly or unjustly, but where, as in the instant case, Congress has given the consent of the United States to be sued on claims for compensation based on aboriginal title to lands taken by the United States. ordinary principles of law and equity, so far as applicable, govern the rights of the parties. *Id.*

INDIAN CLAIMS—Continued.

XLIII. Upon the evidence submitted it is *held* that the plaintiffs Tillamook, Coquille, Too-too-to-ney and Chetco tribes have satisfactorily established original Indian title, through exclusive use and occupancy in 1855, and long prior thereto, to the lands described in the findings; and that they are entitled, as a matter of law, to recover compensation for the lands of which they were deprived, and which were taken by the United States without payment therefor. *Id.*

XLIV. The bands composing plaintiff Tillamook tribe were not altogether moved off their land in 1855, but they were then moved and confined to the conditional reservation, along with other Indian tribes and bands; and such of the land of the Tillamook tribe as lay east of the eastern boundary of this conditional reservation was taken, November 9, 1855, by the Executive Order of that date, which together with the actions of the defendant's representatives in executing it, was ratified and confirmed by the Act of March 3, 1875 (18 Stat. 420). *Id.*

XLV. The actions of the officers of the Government, dating from November 9, 1855, in carrying out the Executive Orders of 1855 and 1865, were ratified and confirmed by the Act of March 3, 1875 (18 Stat. 420); thus confirming as of November 9, 1855, the original taking of the lands beneficially belonging, by original Indian title, to the tribes and bands of Tillamooks, Coquilles, Too-too-to-neys and Chetcos. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23, 299 U. S. 476, and 85 C. Cls. 331, 304 U. S. 111. *Id.*

XLVI. The compensation to which the Indians are entitled is to be measured by the value of the lands described in the findings as of November 9, 1855, plus an additional amount measured by a reasonable rate of interest to make just compensation but these four tribes are not legally and equitably entitled to recover the entire value of the lands since this amount must be offset as of November 9, 1855, by the values as of that date of their respective interests in the land comprising the reservation on August 15, 1894, of which interests these tribes

TAXES—Continued.

FLOOR STOCKS TAX—Continued.

XII. (4) The decisions in *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, where it was held that the Reconstruction Finance Corporation is liable for costs, and in *Federal Housing Administration* v. *Burr*, 309 U. S. 242, where it was held that the Federal Housing Administration is subject to garnishment under State law for wages due to an employee, are distinguished, on the ground that in those cases the Supreme Court was only deciding to what extent Congress meant to waive immunity of the Government when it endowed these corporations with the capacity to sue and to be sued. *Id.*

XIII. (5) Where the sovereign immunity from suit was waived by Congress in acts creating Government corporations and agencies, empowered to sue and be sued like private persons; it was not the intention of Congress that the sovereign's finances should be subjected to risks and inconveniences to which the finances of no private person are by law subjected. *Id.*

XIV. (6) Although the Reconstruction Finance Corporation could not sue in the Court of Claims for the balance due it from the plaintiff, over and above the amount set off and credited to the plaintiff as a result of the judgment in the instant case, nevertheless since the plaintiff has, in the Court of Claims, sued the corporation's principal and beneficiary, which is the United States, so that the real parties are before the court; the court has jurisdiction to dispose completely of the claims of both parties against each other, and judgment is rendered against the plaintiff, and in favor of the defendant, on its counterclaim. *Crane, et al, Receivers*, v. *United States*, 73 C. Cls. 677, certiorari denied 287 U. S. 601; and *John Morrell and Company* v. *United States*, 89 C. Cls. 167, cited and reaffirmed. *Id.*

DIVIDENDS TAX.

XV. (1) Where directors of taxpayer, a corporation, on July 17, 1933, adopted a resolution authorizing the officers of the corporation to pay dividends quarterly during the fiscal year, as the earnings and financial condition of the corporation in the judgment of the officers might justify;

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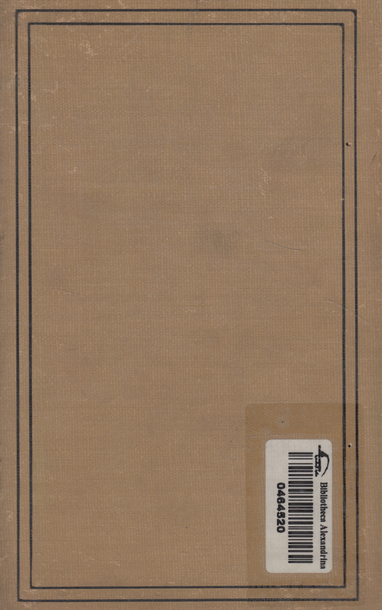











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